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The decision of the income tax case—Pollock v. The Farmers' Loan & Trust Co.—recently rendered by the United States Supreme Court, must be regarded as unsatisfactory and a disappointment; this, not so much on account of what was decided but because there was no effective decision upon the main question, and for the reason that the court was not nearly unanimous in any of its conclusions. Upon only two branches of the general question has it passed at all, namely, the matter of income from rents and that regarding municipal and State bonds. Upon the constitutionality of the law, as a whole, the court renders no opinion, being equally divided. The opinion proper by Mr. Chief Justice Fuller was prefaced by a preliminary statement of the general principles bearing on federal taxation embodied in the constitution of the United States, with special reference to what is known as direct taxation. He declared that taxes on real estate belong to the class of direct taxes, and that the taxes on the rent or income of real estate, which is the incident of its ownership, belong to the same class; that by no previous decision of the court had that question been adjudicated to the contrary of the conclusions announced, and that so much of the act of August 15, 1894, as attempted to impose a tax upon the rent or income of real estate without apportionment was invalid. In the next place the court ruled that the act was invalid in so far as it attempted to levy a tax upon the income derived from municipal bonds. It said that, inasmuch as a municipal corporation is the representative of the State and one of the instrumentalities of the State government, the property and revenues of municipal corporations are not the subjects of federal taxation, nor is the income derived from State, county and municipal securities, since taxation on the interest therefrom operates on the power to borrow before it is exercised, and has a sensible influence on the contract, and that, therefore, such a tax is a tax on the power of the States and their instrumentalities to borrow money, and consequently repugnant to the constitution. Three other questions were presented for decision by the arguments at the bar. These were whether the void provisions as to rents and income from real estate invalidated the whole act; whether as to the income from personal property as such the act was unconstitutional as laying direct taxes, and whether any part of the tax, if not considered as a direct tax, was invalid for want of uniformity on either of the grounds suggested. As to these questions the judges who heard the arguments were equally divided, and no opinion was expressed. The equal division of the court was owing to the absence of Mr. Justice Jackson on account of protracted illness, which left an even number of judges sitting—that is, eight instead of nine. Of the eight sitting members four, viz., Justices Brown, Shiras, Harlan and White, declared in favor of the constitutionality of the law apart from the sections relating to rents and municipal bonds, and four, viz., Chief Justice Fuller and Justices Field, Gray and Brewer, declared against their constitutionality. There were three dissenting opinions filed. One of these read by Mr. Justice Harlan declares in favor of the constitutionality of a tax on rents, but against the constitutionality of a tax on State and municipal bonds. In another dissenting opinion Mr. Justice White argues in favor of the constitutionality of the tax on rents, while as to the bond question, he says that were the question of taxing incomes from municipal bonds before the court as an original question, he would agree that they could not be included in an income tax, but in connection with the question at bar he was bound by the precedents. The most notable of the dissenting opinions is that from the nestor of the court, Mr. Justice Field, who upon broad grounds declares against the constitutionality of the law as a whole. He declares against the exemptions embodied in the act as violating the rule of uniformity, and introducing inequality of treatment in our system of taxation. Among other things, Justice Field criticises the attempt to impose a tax upon the salaries of the federal judges as violating the constitutional provision that their compensation shall not be diminished during their continuance in office. The result of this decision is to leave the main question as it was determined by the lower court, that is in

favor of the constitutionality of the act. It is quite probable, however, that an early rehearing of the case will be had before a full bench, with, it is to be hoped, more satisfactory results.

NOTES OF RECENT DECISIONS.

BANKS AND BANKING—INSOLVENCY—TRUST FUNDS.—The Supreme Court of California, in Henderson v. O'Connor, 39 Pac. Rep. 786, decide that a bank which, upon a draft being deposited with it for collection, refuses to accept it as a deposit, but advances a small amount to the payee on her check, and charges her therewith on its books as an overdraft, and sends it for collection to its correspondent, and, upon receiving notice of its collection, credits the payee's account therewith, is the payee's agent, and the proceeds constitute a trust fund, which the payee is entitled to recover from the receiver. The rule of law applicable to the facts of this caes is stated and exemplified by Mr. Morse in his work on Banking (section 568, subd. d.), as follows: "A bank, upon receiving from L a draft indorsed 'For collection on his account,' provisionally credited him with it, presented it for payment, and surrendered it to the drawee on receiving his check for the amount, but, instead of demanding the money thereon, had the check certified as good, and on the same day suspended payment. The next day the check was collected, and the money mingled with other moneys in the hands of the receiver. It was decided that he held it in trust for L. The bank had no authority to take anything but money. Receiving a check and having it certified was not a completion of its agency to collect. That duty terminated only with payment of the check, and only then did the authority to credit arise if the bank was a going concern. But the bank became insolvent before the agency was completed and the money received, so that no authority existed to credit the money on general account; and it was still trust money at the time it went into the hands of the receiver, and, being clearly traced into his hands, may be recovered." Citing Levi v. Bank, 5 Dill. 104; First Nat. Bank of Crown Point v. First. Nat. Bank of Richmond, 76 Ind. 561; and German Am. Bank v. Third Nat. Bank, 2 Tex. Law J. 150. The following cases are also more or less directly in point: Armstrong v. National Bank, 90 Ky. 431, 14 S. W. Rep. 411; Bank v. Peters, 123 N. Y. 272, 25 N. E. Rep. 319; Bank v. Beal, 50 Fed. Rep. 355; McLeod v. Evans, 66 Wis. 401, 28 N. W. Rep. 173, 214; Beal v. Bank, 55 Fed. Rep. 895, 5 C. C. A. 304; Jones v. Kilbreth, 49 Ohio St. 401, 31 N. E. Rep. 346; First Nat. Bank v. Armstrong, 36 Fed. Rep. 59; Commercial Bank v. Armstrong, 148 U. S. 50, 13 Sup. Ct. Rep. 533.

DEED—PRESENT INTEREST—CONSTRUCTION.—In Wilson v. Carrico, 40 N. E. Rep. 50, it is held by the Supreme Court of Indiana that an instrument executed with all the formalities of a warranty deed is not rendered testamentary in character by a clause therein that it is not to take effect until the death of the grantors, but creates a present interest in the grantee, postponing the full enjoyment until the grantor's death. The court says in part:

It was a principle recognized by the feudal law that there should always be a known owner of every freehold estate, and that the title thereto should never be in abeyance. Hence, at common law, a freehold to commence in future could not be conveyed, for the reason that the same would be in abeyance from the execution of the conveyance until the future estate of the grantee should vest. Under the statute of this State, a freehold estate may be createdto commence in future (section 2959, Rev. St. 1881; section 3379, Rev. St. 1894), and hence the common law principle above stated has been entirely abrogated. This deed is in the statutory form, and in the granting part accords with the provisions of section 2927, Rev. St. 1881 (section 3346, Rev. St. 1894), and contains what are, by law, made operative words of conveyance, and, in effect, transfers all the estate or interest of the grantors in the lands in suit to the grantee. The term "convey and warrant," when given their legal purport or acceptation, fully indicate an intention to convey a present estate to the grantee, and defend the title thereto, and in no way is it apparent or to be inferred from these words that the grantors intended to devise the real estate in question. The instrument was acknowledged and recorded in like manner as are other deeds; therefore we fail to recognize anything which signifies that it was intended to serve the purpose of a will. The question, then, arises, what was the purpose intended to be served by the inapt expression, namely, "to be of none effect until after the death of said Bazzel Carrico and Frances Carrico, then to be in full force?" It is evident that the drafting of the indenture in question was not skillfully performed, and that thereby it very closely approximates to what may be termed the "danger line," by which a judicial construction might result in adjudging the deed to be a nullity. While it may be said, in regard to the point under consideration, that the authorities "fight on both sides" of the question, however, we find that in the latter decisions the courts are inclined to uphold a deed of this character

if, upon a reasonable interpretation of all its parts, it can be said that the grantor did not intend to create, or, in other words, execute, that which must be construed and held to be void. In construing written instruments, courts frequently do—and properly—too—give to an expression a meaning different from that which it ordinarily bears, in order to import sense into it, and make it speak that which upon an inspection of the whole, the parties really intended that it should. We find that there is no ambiguity in the granting clause of the deed in the case at bar, and consequently we are left free to effectuate the intention of the grantors expressed in the subsequent clause or condition. The grantors had, as we have seen, by operative words, clear and significant, conveyed an interest or fee, *in præsenti* to the grantee. Having done this, they could not, in legal parlance, "blow hot and cold," or, in other words, reserve or take back that which they had granted. In the case of Owen v. Williams, 114 Ind. 179, 15 N. E. Rep. 678, the instrument in contest was in the form of a deed, and in the granting clause, by its terms, "did convey and warrant to Williams, after my decease, and not before." This court held that the phrase, "after my decease, and not before," did not make the deed testamentary, but was meant and operated to show that the grantee's use and enjoyment of the realty would not begin under the deed until after the death of the grantor. In the case of Cates v. Cates, 135 Ind. 272, 34 N. E. Rep. 957, the deed therein in controversy was also in the statutory form, but contained the following reservation: "The grantor, Prior Cates, hereby expressly excepts and reserves from this grant all the estate in said lands, and the use, occupation, rents, and proceeds thereof, unto himself, during his natural life." This court, in that case, upon a full review and consideration of many authorities upon the question involved, held that such an instrument must be construed as conveying a present interest in the real estate, the full enjoyment of which was postponed until after the grantor's death. In the case of White v. Hopkins, 80 Ga. 154, 4 S. E. Rep. 863, cited in Cates v. Cates, *supra*, the deed contained this clause or condition: "The title to the above-described tract of land to still remain in said Lemuel Hopkins [grantor] for and during his lifetime, and, at his death, to immediately vest in said Lewis Hopkins [grantee]." It was held by the Supreme Court of Georgia in that case that an absolute title was, by this deed, conveyed to the grantee; that it passed a present interest in the land, and took effect immediately; and that, after its execution, it was irrevocable by the grantor. In Graves v. Atwood, 52 Conn. 512, the deed contained the following: "The condition of this deed is such that I hereby reserve all of my right, title, and interest in the aforesaid described pieces of land, with all the buildings thereon, during my natural life." It was held by the court that this condition, read in the light of the grant, was to be interpreted as a reservation of the same measure of use thereafter as tenants for life as the grantor had before enjoyed it as owner. In Webster v. Webster, 33 N. H. 18, the condition was: "Reserving all the right, title, and interest in and unto the above-named land," etc., "for and during my natural life." In Bunch v. Nicks, 50 Ark. 367, 7 S. W. Rep. 563, the deed contained the following clause: "And the deed shall go into full force and effect at my death." The court held this deed to be a valid one, conveying a present title to the grantee, with the right of possession and use postponed until the grantor's death. In Wyman v. Brown, 50 Me. 139, the deed was as follows: "This deed not to take effect during my lifetime,—to take effect and be in force from and after my death." This was held to be valid. In the case of Abbott v. Holway, 72 Me. 298, the instrument contained this clause: "This deed is not to take effect and operate as a conveyance until my decease." This was held to be a good and valid conveyance. In Shackelton v. Sebree, 86 Ill. 616, the deed contained covenants of warranty, and also this clause: "This deed did not take effect until after my death,—not to be recorded until after my decease." This instrument was held operative as a deed, and not intended as a testamentary disposition of property. These authorities most of them at least—were cited with approval by this court in Cate v. Cates, *supra*. It is a settled legal rule that in the interpretation of an instrument, where the terms employed are ambiguous, or susceptible of more than one meaning, the court will consider the subsequent acts of the parties to ascertain how they understood it, and as indicating what construction they have placed upon it. Wagon Works v. Coombs, 124 Ind. 62, 24 N. E. Rep. 589, and cases there cited; Lyles v. Lescher, 108 Ind. 382, 9 N. E. Rep. 365. However, while it is proper to resort to this rule to show a practical construction by the parties, still, after all, the intention must be determined from the words of the instrument.

The manner in which this deed was treated by the parties in this case, as it appears, is, briefly, as follows: It was executed in 1867, for a valuable consideration, and duly recorded. In 1870, during the lifetime of the grantors, for a valuable consideration, the grantee sold and conveyed the land to the appellant, subject to the life estate of the former. This deed was also recorded. Bazzel Carrico died in 1872, two years and over after the conveyance to the appellant. Frances, his wife, died in 1892, nearly twelve years after this second conveyance; and not until after her death, so far as it is disclosed, was this deed called in question. These subsequent acts of the grantors in suffering the deed to be placed upon record, and in permitting the land to be sold and conveyed by their grantee to the appellant, subject to their life estate, are incompatible with the contention of appellee, and hostile to the theory now advanced and advocated by him. In Broom's Maxims, *540, in translating a fundamental maxim of the law, it is said: "A liberal construction should be placed upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties." Applying the reason and the principle as laid down by the authorities cited, and guided by the rule of construction, that the clause in controversy must be construed most favorably to the grantee, we cannot hold that the grantors intended that this obligation was to be null and void; but we are constrained to decide that it conveyed a present interest in the real estate to the grantee, the full enjoyment of which was, by the subsequent clause, intended to be postponed until after the death of both of the grantors. By so holding, we carry into effect the intention of the parties, and we fail to recognize wherein this construction works an injury or injustice to any one.

GARNISHMENT — CONFLICT OF LAWS.—In Wyeth Hardware & Manuf. Co. v. Lang, 29 S. W. Rep. 1010, it is held by the Supreme Court of Missouri that debts due a resident by a non-resident may be garnished in the

State of the non-resident. Burgess, J., delivered the opinion of the court as follows:

This is an injunctive proceeding instituted by plaintiff to enjoin and restrain defendants from prosecuting suit against it in the State of Kansas by attachment, and the garnishment of debts due it by various of their customers and debtors in that State, the plaintiff and defendants being residents of this State. From a judgment for defendants on demurrer, plaintiff took the case to the Kansas City Court of Appeals by writ of error, where the judgment of the Circuit Court was affirmed in an opinion by Smith, P. J. The case was then certified to this court because of a conflict in the opinion with the decisions of the St. Louis Court of Appeals in Keating v. Refrigerator Co., 32 Mo. App. 293; Bank v. Wickham, 23 Mo. App. 663; Fielder v. Jessup, 24 Mo. App. 91. The opinion in this case is reported in 54 Mo. App. 147. The statement of facts, and that part of the opinion necessary to a disposition of the case by this court, are as follows: "The petition in this case, which is for an injunction, alleged that both plaintiff and defendants were business corporations organized and existing under the statutes of this State. It was further alleged that the defendants had sued the plaintiff by attachment in one of the courts of the State of Kansas, and had procured the process of garnishment in said suit to be served upon certain debtors of the plaintiff, who were its customers, and had become indebted to it for merchandise sold by it to them in this State where such indebtedness, by the terms of the sale of such merchandise for which it was incurred, was made payable; that the plaintiff here, who was the defendant in the attachment suit, was notified thereof by publication, and that judgment had been severally pronounced against the defendant and the garnishees therein. The petition fails to disclose the nature of the claim upon which the attachment proceedings were grounded. It appears that the plaintiff is a solvent corporation, and that the defendants are about to take steps to compel, by execution, the garnishees, to satisfy the amount of the judgments against them; that the garnishees, who are plaintiff's customers, are in great danger of having to pay their indebtedness to plaintiff twice, which would frustrate the trade relations between the former and the latter, to the great injury of the latter, etc. The prayer was that defendants be enjoined and restrained from enforcing and collecting the judgments against plaintiff and the garnishees, etc. The defendants interposed a demurrer to the petition, on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and, the plaintiff electing to abide by its petition, judgment was given accordingly. The plaintiff's insistence is that the proceedings of the Kansas court are void for want of jurisdiction, for the reason that the debts garnished had no *situs* in that State, and that consequently they were not liable to be attached there. Contracts respecting personal property and debts are now universally treated as having no *situs* or locality, and they follow the owner in point of right. They are deemed to be in the place and are disposed of by the law of the domicile of the owner, wherever in point of fact, they may be situate, in accordance with the maxim, '*mobilia non habent situm.*' Story. Confl. Laws, §§ 362, 399; Case of State Tax on Foreign-Held Bonds, 15 Wall. 320; Renier v. Hurlbut (Wis.), 50 N. W. Rep. 783; Wallace v. McConnell, 13 Pet. 136; Railroad Co. v. Gomila, 132 U. S. 485, 10 Sup. Ct. Rep. 155; Bank v. Rollins, 99 Mass. 313; Trowbridge v. Means, 5 Ark. 135. It has been ruled, in effect, that a debt without reference to where payable, is deemed attached to the person of the owner, so as to have its *situs* at his domicile; yet this fiction always yields to laws for attaching the property of a non-resident, because such laws necessarily assume that the property has a *situs* distinct from the owner's domicile. Wherever the creditor might maintain a suit to recover the debt, there it may be attached as his property, provided the laws of such place authorize it. Harvey v. Railway (Minn.), 52 N. N. W. Rep. 905; Nichols v. Hooper (Vt.), 17 Atl. Rep. Rep. 134; Railroad Co. v. Crane, 102 Ill. 258; Berry v. Davis (Tex. Sup.), 13 S. W. Rep. 979; Railroad Co. v. Dougan (Ill. Sup.) 31 N. E. Rep. 594; Boyd v. Insurance Co. (Tenn.), 16 S. W. Rep. 470; Railroad Co. v. Thomson, 31 Kan. 180, 1 Pac. Rep. 622, and cases there cited; Plimpton v. Bigelow, 93 N. Y. 592. According to the rulings in the cases just cited, it would seem quite obvious that the Kansas court had the requisite jurisdiction to impound the plaintiff's credits there by the attachment proceedings. And this doctrine seems just and reasonable; for, if the defendant cannot reach the plaintiff's credit by the attachment process in Kansas because they have a *situs* in this State, he cannot reach them in this State, because there can be no service of notice had on the garnishees in this State, so that it results that plaintiff's credits cannot be attached at all. But we are confronted with contrary rulings of the St. Louis Court of Appeals, to the effect that the *situs* of the debt is the place where the debtor resides, unless the debt by the terms of the contract is made payable elsewhere, and in the latter event such *situs* is at the place where the debt is payable. Keating v. Refrigerator Co., 32 Mo. App. 293; Bank v. Wickham, 23 Mo. App. 663; Fielder v. Jessup, 24 Mo. App. 91. And to the exception to the rule, as indicated by the italicized words thereof, we cannot agree, for the reasons already stated. We think the rule declared in Harvey v. Railway Co., and the other cases cited which are in accord with it, will better subserve interstate trade and business relations than that embraced in the foregoing exceptions."

That part of the opinion of the Kansas City Court of Appeals herein quoted is adopted as the opinion of this court, being, as we think, supported by reason and the weight of authority.

CRIMINAL LAW—ROBBERY—INDICTMENT.—In Evans v. State, 29 S. W. Rep. 266, it is held by the Texas Court of Criminal Appeals that an allegation in an indictment for robbery that the property was taken from the "possion" of the prosecutor vitiates the indictment. Henderson, J., who delivered the opinion says:

We have examined the dictionaries, and nowhere find such a word as "possion," nor do we find it used as an abbreviation for "possession" or any other word. It is not *idem sonans* with the word "possession," nor can we consider it simply as an instance of bad spelling. Evidently the pleader intended to write in the indictment the word "possession," but with us it is not a question of what he means, but what did he do; and the word "possession," in defining the offense of the robbery, is material, and we cannot supply it by intendment. In Jones v. State, 25 Tex. App. 621, this court at a former term held that in an indict-

ment for theft the word "appriate" was not equivalent to the word "appropriate" as used in the statute defining theft, and that its use vitiated the indictmint. In State v. Williamson, 43 Tex. 502, referred to in the above cases, the very word "possion" used in the indictment in this case was used in the indictment in that case. The question came up in that case on a motion in arrest of judgment. The court in that case seemed to treat the word as one of form, saying, "An objection of this character should be interposed before the trial, and should not be made the ground of a motion in arrest of judgment;" and yet they say, "It cannot be doubted that the indictment must aver that the property was taken from the possession of the owner." We do not think it can be doubted that if an indictment for theft or for robbery should fail to properly allege the possession of the property taken it is a matter of substance, and of such materiality that it can be taken advantage of by motion in arrest of judgment, as well as by a motion to quash the indictment; and the only question for us to determine is, does the use of the word "possion" accomplish this? As before stated the word used is not *idem sonans* with "possession," and it is not an abbreviation of that word, and we cannot supply a proper word conveying in its meaning a material averment in an indictment. If we were to undertake to do so, we would afford a bad precedent, when, by the rigid adherence to the rule, those who draw indictments will be encouraged to use more care and diligence, and mistakes will thus be avoided.

MINING ON PUBLIC LANDS.[1]

Mineral Lands.—The law requires, that all lands valuable for minerals shall be reserved from sale to be disposed of under special laws relative thereto.[2] Since such lands can only be disposed of as mineral lands, the land officer has no authority to dispose of such lands in any other mode, and if they are patented as agricultural lands, such patents are issued without authority and may be vacated.[3]

Occupants and Purchasers of Such Lands.—The law allows such lands to be occupied and purchased by any citizen of the United States, or by any one who has declared his intention to become such.[4] It will be seen, that this privilege is not extended to aliens. If an alien makes a mining location and then conveys his interest to a citizen, the latter acquires a good title, provided no one has acquired prior rights.[5] If aliens and citizens jointly occupy mining land under the mining laws they can hold the land, because the title of the citizens will be good.[6] The deed of an alien in the chain of title will not invalidate the title.[7] For the purpose of occupying and purchasing mining land a corporation has been held to be a citizen of the State of its creation.[8] This was declared to be the law in a case where it was conceded, that all the stockholders were citizens, though it was intimated that, when necessary, the court could go behind the incorporation papers to ascertain who were the parties in interest.[9] Even in such case, so long as any of the stockholders were citizens, the title of the corporation would be good under the decision already cited relative to a joint location by citizens and aliens.[10] The law makes the articles of incorporation evidence of the citizenship of the corporation.[11] It has been held that a conveyance of a mining location to an alien is void *ab initio*, and that such conveyance is equivalent to an abandonment of the land by the grantor, leaving it open to location by any one;[12] that a conveyance to an alien of a mining claim was equivalent in law to the descent of law to an alien, where aliens were not allowed to inherit land, and was *ipso facto* void.[13] The highest appellate courts have repudiated these views, holding that such conveyance is good as to all the world, except the government, which can only vacate it by a proceeding in the nature of office found, and that the defect therein can be cured if such grantee becomes naturalized before any final judgment in the matter.[14] So the location of a mining claim by an alien is good against all the world except the United States.[15] In an adverse suit relative to a mining claim the United States is really a

[1] This article is intended as a continuation of an article of a similar nature, which appeared in 26 Cent. Law J. 364, and to which reference is made for a full elucidation of the subject. The intention herein is to call attention to decisions promulgated since that article was written, which in effect add to or qualify the propositions there laid down.

[2] Act of Congress, July 4, 1866.

[3] U. S. v. Culver, 52 Fed. Rep. 81.

[4] Act of Congress, May 10, 1872.

[5] North N. M. Co. v. Orient M. Co., 6 Sawy. 299.

[6] North N. M. Co. v. Orient M. Co., *supra*.

[7] Gorman M. Co. v. Alexander, 2 S. Dak. 557, 51 N. W. Rep. 346.

[8] North N. M. Co. v. Orient M. Co., *supra*.

[9] McKinley v. Wheeler, 130 U. S. 630.

[10] North N. M. Co. v. Orient M. Co., *supra*.

[11] Act of Congress, May 10, 1872.

[12] Tibbitts v. Ah Tong, 4 Mont. 536.

[13] Wulf v. Manuel, 9 Mont. 279.

[14] Manuel v. Wulf, 152 U. S. 505, 14 Sup. Ct. Rep. 651.

[15] Billings v. Aspen M. & S. Co. (U. S. C. C. App., 8 Dist.) 51 Fed. Rep. 338, 52 Fed. Rep. 250.

party to the proceeding, and the objection of alienage may properly be raised in such suit.[16]

Possession of Land Prior to Location.—When one party is in possession of public lands, another person cannot forcibly intrude on such possession,[17] but such possession must be an actual *pedis possessio*, unless the possessor can show a compliance with the act of congress relative to locating such lands.[18] Mere possession, however, of mining lands does not avail against one, who has complied with the mining laws and claims such land by virtue of such compliance.[19] Where there were no local regulations governing the subject it was held, that the discoverer of a mine must immediately locate his claim by marking its boundaries in order to hold it against a subsequent valid claim peacefully made;[20] in another case it was held, that the discoverer could occupy twenty days wherein to mark his claim, such being a reasonable time.[21] Such discover must, however, show good faith and reasonable diligence in developing the course of his vein and afterwards in marking properly the boundaries. The law does not allow him to post his notice and then leave his claim incomplete and go off in search of other claims prior to completing his location.[22]

Locating a Claim.—The United States law requires, that a mining claim shall be distinctly marked on the ground so that its boundaries can be readily traced.[23] Under this law it was held to be sufficient to put a prominent stake or monument in the center of each end of the claim and to place upon one or both of them a written notice, that the locator claims in length from stake to stake and so much land on each side of said line.[24] Though the claim as staked off may be larger than is allowed by law, yet when it appears that the locator was acting in good faith, intending only to claim the amount allowed by law, and his notice posted on the claim states the distances claimed in accordance with the law, such mistake will not vitiate the location.[25] Such error may be corrected before the rights of others intervene.[26] The location is then void only as to excess of land claimed.[27] The State laws require a written notice, describing the land claimed to be posted on the claim. Under such a law it was held, that where the corners of the claim were marked by rock mounds, such notice inclosed in a tin can might be placed in a shelf in a rock mound on the claim.[28] It has been generally held, but not always, that the discovery shaft on which such notice is required to be posted, must be the shaft, which contains the vein, upon the discovery of which the locator bases his claim.[28]

Discovery of a Vein.—The definitions of a vein of mineral differ greatly. It is said such difference is due to the fact that the veins themselves differ greatly in their character in the different sections of the country.[30] Mineral must be found in place as distinguished from float mineral.[31] Excluding the waste slide or debris on the surface of a mountain, all things in the mass of a mountain are in place.[32] Something must be found in place as rock, clay or earth, so colored, stained and changed and decomposed by the mineral elements as to mark and distinguish it from the surrounding country. There is that indescribable peculiarity in the ledge matter, the matrix of all ledges, by which the experienced miner easily recognizes his ledge when discovered.[33]

Permanent Monuments.—The law of the United States does not require a record to be made of the location of a mining claim,[34] but it evidently contemplates the probability that such record will be made, as the States all provide therefor, and it says, such records shall contain such a description of the claim by reference to some natural object or permanent monument

[16] Manuel v. Wulf, *supra*; Billings v. Aspen M. & S. Co., 52 Fed. Rep. 250, *supra*.

[17] Field v. Gray, 1 Ariz. 404, 25 Pac. Rep. 793.

[18] Funk v. Sterrett, 59 Cal. 613.

[19] Garthe v. Hart, 73 Cal. 541; Gregory v. Peshbaker, 73 Cal. 109.

[20] Patterson v. Tarbell (Oreg. 1894), 37 Pac. Rep. 76.

[21] Doe v. Waterloo M. Co., 55 Fed. Rep. 11.

[22] Burke v. McDonald, 2 Idaho, 33 Pac. Rep. 49.

[23] Act of Congress, May 10, 1872.

[24] North N. M. Co. v. Orient M. Co., 6 Sawy. 299; Carter v. Bacigalupi, 83 Cal. 187, 23 Pac. Rep. 361.

[25] Hanson v. Fletcher (Utah, 1894), 37 Pac. Rep. 480.

[26] Stemwinder M. Co. v. Emma, etc. M. Co., 2 Idaho, 420, 21 Pac. Rep. 1040.

[27] Burke v. McDonald, 2 Idaho, 646, 33 Pac. Rep. 49.

[28] Gird v. California O. Co., 60 Fed. Rep. 531.

[29] O'Donnell v. Glenn, 8 Mont. 248, 19 Pac. Rep. 302.

[30] Book v. Justice M. Co., 58 Fed. Rep. 106.

[31] Book v. Justice M. Co., *supra*.

[32] Jones v. Prospect M. T. Co., 21 Nev. 339, 31 Pac. Rep. 642.

[33] Burke v. McDonald, 2 Idaho, 646, 33 Pac. Rep. 49.

[34] Rev. Stat. U. S. § 2324.

as will identify the claim.[35] Such reference is not required in the notice placed on the ground, but only in the record.[36] A reference to a patented claim is sufficient. Where the location certificate stated that corner No. 4 survey No. 889, bore northerly about one mile from the place of beginning, it was held, that proof was admissible as to whether that corner was a permanent monument.[37] Trees blazed and squared, rock monuments and the prospect hole are permanent objects. The fact that the record calls for stakes, when they are trees cut off three feet from the ground, blazed and squared, is immaterial.[38] A reference to a large bowlder at the west end of "Tim" "lode," with a reference to two other lodes and A's house, is sufficient, though there be no "Tim" "lode."[39] A stake or a stone, properly marked, may be a permanent monument, and where the only reference was to a stake, it was left to the jury to decide whether the stake was a permanent monument.[40] When the claim was described as commencing at a young black oak tree about 400 feet northerly of an old cross-cut or drift in the ravine, thence southeast to a black oak tree near a small ravine on the north side of T creek, it was held that T creek, in the absence of evidence to the contrary, must be held to be a known natural monument.[41] Where the reference was to the northeast corner of Iron King claim, evidence was admitted to show that Iron King claim was a permanent monument, though it was not designated as such in the certificate.[42] When it cannot be said that it is impossible to identify the lode from the description in the location certificate, the certificate must be admitted in evidence, and then proof is admissible as to whether the references therein are to natural monuments or permanent objects.[43] It is a matter of proof, and not of inspection of certificates, to decide whether the references are to permanent monuments.[44] When there is a reference to some object, as to a mine, such object will be presumed to be a well-known natural object or permanent monument, until the contrary appears.[45] The last ruling imposes on the objector the burden of proof. In the absence of any evidence on the subject such reference will be presumed to be sufficient.[46] If there are no permanent monuments near save the rocks and neighboring hills, stakes driven into the ground are the most certain means of identification.[47] Such reference is not required under the law, when there are no such monuments to be found.[48] A shaft sunk in the ground or any other fixed natural object, will suffice for reference.[49] The object of the law is to give notice to all the world, that a certain definite part of the public land has been appropriated, and if the description is too vague to give such information, it would be an injustice to other locators to allow such a notice to impair their rights to land, which they had located, believing it to be unappropriated. A location certificate (there being six all contiguous of the same nature by the same locators) claimed 1500 feet on a ledge of shale and wax. This ledge was described as situated near the head of the right hand fork of Tie Canyon about five miles from the D. and R. G. Railroad in Utah County of Utah Territory. It was held, that an officer with a writ of restitution would not be able to identify these claims, and they might be swung around so as to cover any piece of ground within several miles of the locality.[50] If the boundaries contained in the declaratory statement point out the locus clearly, it is immaterial that they are not in all respects identical with the lines staked off on the ground.[51] Stakes and monuments referred to in the certificate, which are on the ground, control the directions stated in such certificate.[52]

Annual Labor.—Annual labor done on one

[35] Book v. Justice M. Co., 58 Fed. Rep. 106.
[36] Brady v. Husby, 21 Nev. 453, 33 Pac. Rep. 801.
[37] Metcalf v. Prescott, 10 Mont. 283, 25 Pac. Rep. 1037.
[38] Hanson v. Fletcher (Utah June 1894), 37 Pac. Rep. 480.
[39] Garner v. Glenn, 8 Mont. 371, 20 Pac. Rep. 654.
[40] O'Donnell v. Glenn, 8 Mont. 248, 19 Pac. Rep. 302.
[41] Carter v. Bacigalupi, 83 Cal. 187, 23 Pac. Rep. 361.
[42] Seidler v. Lafave, 4 New Mex. 369, 20 Pac. Rep. 789.
[43] Dillon v. Bayliss, 11 Mont. 171, 27 Pac. Rep. 724.
[44] Metcalf v. Prescott, 10 Mont. 283, 25 Pac. Rep. 1037.
[45] Hammer v. Garfield M. Co., 130 U. S. 291.
[46] Brady v. Husby, 21 Nev. 453, 33 Pac. Rep. 801.
[47] Hammer v. Garfield M. Co., *supra*.
[48] Hammer v. Garfield M. Co., *supra*.
[49] North N. M. Co. v. Orient M. Co., 6 Sawy. 299.
[50] Darger v. Le Sieur, 8 Utah, 160, 30 Pac. Rep. 362.
[51] Garner v. Glenn, 8 Mont. 371, 20 Pac. Rep. 654.
[52] Book v. Justice M. Co., 58 Fed. Rep. 106.

lode cannot also apply to another lode unless such lodes are contiguous.[53] When the local law provides for the recording of the doing of the annual work, a failure to record works no forfeiture, unless the local law so provides.[54] To advertise a party out for not refunding to another his share of the annual work done by the other, the two must be co-owners the year when the work was done.[55] When the annual labor is not done on the claim, the burden is on the locator, to prove that such labor tends to develop the claim.[56] After the land-office has accepted the money, the party is not required to do any annual work while waiting for the issue of the patent.[57] So when adverse possession of the claim is taken and held wrongfully, a locator is excused from doing annual work during such possession.[58]

Abandonment and Forfeiture. — A forfeiture of a locator's title can only be established by clear and convincing proof of failure of the locator to have the annual work done.[59] If a locator, who has failed for one year to do the annual work required, resumes work in good faith for the purpose of doing his annual work, before a second party has completed his relocation, he regains his title,[60] but he must continue such work with reasonable diligence, till he has completed the work required by law.[61]

Rights of Locators to Veins.—A locator has a right to take the mineral in his lode in following it downward, though it may pass beyond his side lines extended vertically downward, even though in so doing he invade an earlier and patented claim.[62] On the other hand, a lode, whose apex is outside of his claim, does not belong to a locator nor to a patentee.[63] The construction of the law as to the rights of two locators, whose veins intersect or cross each other, is still in doubt. One construction is that the junior locator is entitled to all of his vein except the mineral contained within the space of intersection.[64] The other view is, that the older locator is entitled to all the mineral lying within his lines extended vertically downward, and the junior locator has only the right of way across the senior location.[65] A party in possession of a mining claim, who conveys such claim to A and then locates a neighboring claim prior to the location by A of the claim conveyed to him, cannot, relative to the uniting of two veins in their descent, claim the prior location; his deed to A estops him to claim priority over A.[66] "When the end lines of a claim are not parallel, a locator is denied the right to follow his lode in its descent beyond his side lines extended vertically downward. But this privilege has been allowed, when the end lines were substantially parallel. Where two side lines ran along the course of the vein and two shorter end lines ran across it, which two sets of lines were distinct and apparent, it was held that there was a substantial compliance with the law as to parallelism of end lines.[67] The end lines of a claim properly so called are those which are cross-wise of the general course of the vein on the surface.[68] It has been considered that as to many questions concerning lodes no general rule can be laid down, since lodes present themselves in such variety of forms. A location was laid along the course of a vein, but the apex of the vein crossed the side line of the location before it reached the end line thereof. In that case it was held relative to the right of the locator to mine the ore, that his end line was to be considered to be drawn across his location at the point where the vein left his location. If another claim was so located as to be entitled to the mineral at the same place, it was held, that priority of location would control.[69]

Adversing Application for Patent. — Though the land office requires ten publica-

[53] Gird v. California Oil Co., 60 Fed. Rep. 531.
[54] Book v. Justice M. Co., 58 Fed. Rep. 106.
[55] Turner v. Sawyer, 150 U. S. 578, 14 S. C. Rep. 192.
[56] Hall v. Kearny, 18 Colo. 505, 33 Pac. Rep. 373.
[57] Benson M. & S. Co. v. Alta M. & S. Co., 145 U. S. 428, 12 Sup. Ct. Rep. 877.
[58] Utah M. & M. Co. v. Dickert, 6 Utah 183, 21 Pac. Rep. 1002.
[59] Hammer v. Garfield M. Co., 130 U. S. 291.
[60] McCormick v. Baldwin (Cal. Sept., 1894), 37 Pac. Rep. 903.
[61] Honaker v. Martin, 11 Mont. 91, 27 Pac. Rep. 397.
[62] Montana Co. v. Clark, 42 Fed. Rep. 626; Colorado C., etc. Co. v. Turck (U. S. C. C. App. 8 Dis.), 50 Fed. Rep. 888.
[63] Jones v. Prospect M. T. Co., 21 Nev. 339, 31 Pac. Rep. 642
[64] Branagan v. Dulaney, 8 Colo. 408; Hall v. Equitor Co., Morrison M. Rights (3d ed.), 282; Lee v. Stahl, 9 Colo. 208.
[65] Watervale M. Co. v. Leach (Ariz. April 1893), 33 Pac. Rep. 418; Pardee v. Murray, 4 Mont. 234, 279.
[66] Stinchfield v. Gillis, 96 Cal. 33, 30 Pac. Rep. 839.
[67] Doe v. Sanger, 83 Cal. 203, 23 Pac. Rep. 365.
[68] Argentine M. Co. v. Teinble M. Co., 122 U. S. 478.
[69] Tyler M. Co. v. Sweeney, 54 Fed. Rep. 284.

tions of the application for a patent, yet the adverse claim must be filed in the local land-office within sixty days after the first publication.[70] When an adverse claim has been filed and an adverse suit is pending it is not necessary to file another claim against a second application by the same party for the same lode under another name, and a patent so issued is void.[71] If a party allows an application for a patent for a claim, wherein his own discovery shaft is included, to go to patent, the rest of his claim becomes unappropriated public land.[72] A location is void *in toto*, if the discovery shaft is placed on ground, whereon another already has a valid location.[73] In an adverse suit each party must set forth the facts on which he relies. It is not sufficient to say he has complied with the United States laws.[74] The petition must allege facts showing that the action is brought within the time limited by law.[75] It is no defense to an adverse suit, that the plaintiff's claim filed in the land-office does not show the nature, boundaries and extent of plaintiff's location. Such objection should be made in the land-office, where the claim was filed.[76] The law requires an adverse suit to be prosecuted with due diligence, but the court in which such suit is pending is to decide whether such diligence has been exercised and not the land-office. Should the land-office issue a patent, deciding itself that due diligence had not been issued, such patent would be void.[77] If the adverse suit is discontinued, another cannot be brought after the expiration of the thirty days originally allowed, even though the State law permits the suit to be renewed within a year.[78] In an adverse suit a party must recover on the strength of his own title, and if it appears, that when he located the ground, any other person had a valid location on it or a patent to it, his title is void.[79] In an adverse suit since the act of congress of March 3, 1881, the verdict must specify, that the title to the right of possession of the area of land in conflict is in the plaintiff as against all other parties, including the government, and by compliance with all the laws applicable.[80] When each of two parties claims an interest in the same claim, and there is a dispute between them, not as to the location or boundaries, but whether one has purchased the other's title, and one of them applies for a patent on the claim, it is not necessary for the other in order to protect his rights to file an adverse claim.[81]

Patents.—A co-owner obtaining a patent on a lode without the knowledge of his co-owner, holds the title as trustee for the latter as to his interest, and a bill in equity will lie to have him so declared.[82] In a suit between private parties a patent for a lode has been held void as to the land therein granted, which was in excess of three hundred feet from the centre of the vein on the side of the claim.[83]

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[70] Hunt v. Eureka G. M. Co., 14 Colo. 451, 24 Pac. Rep. 550.
[71] Rose v. Richmond M. Co., 17 Nev. 25.
[72] Miller v. Girard, 3 Colo. App. 278, 33 Pac. Rep. 69.
[73] Gwillim v. Donnellan, 115 U. S. 45.
[74] Anthony v. Jillson, 83 Cal. 296, 23 Pac. Rep. 419.
[75] Cronin v. Bear Creek G. M. Co. (Idaho Feb. 1893), 32 Pac. Rep. 204.
[76] Rose v. Richmond M. Co., 17 Nev. 25.
[77] Rose v. Richmond M. Co., 17 Nev. 25.
[78] Steves v. Carson, 42 Fed. Rep. 821.
[79] Gwillim v. Donnellan, 115 U. S. 45.
[80] Burke v. McDonald, 2 Idaho 646, 33 Pac. Rep. 48.
[81] Turner v. Sawyer, 150 U. S. 578, 14 Sup. Ct. Rep. 192.
[82] Turner v. Sawyer, 150 U. S. 578, 14 Sup. Ct. Rep. 192.
[83] Lakin v. Dolly, 53 Fed. Rep. 333.

WHAT ARE FIXTURES—MACHINERY—CHATTEL MORTGAGES—FAILURE TO RECORD.

CHASE V. TACOMA BOX CO.

Supreme Court of Washington, March 8, 1895.

1. Machines connected by belting with the shafting in a building, which are fastened to the floor by screws or nails and bolts, and could be removed without impairing the freehold, and could be used for the purposes for which they were intended as well in any other building, and are constructed after fixed patterns and bought and sold in gross, are not fixtures.

2. A mortgagor claiming chattels as fixtures under a real-estate mortgage cannot complain that a subsequent mortgage on the chattels is not verified by the mortgagor, and recorded, as required by 1 Hill's Code, § 1648, *et seq.*, as the statutory requirements are only for the protection of creditors of the mortgagor and subsequent purchasers and mortgagees.

GORDON, J.: The subject-matter of this litigation is machinery and apparatus in a box factory located upon block 7,632, in a certain addition to the city of Tacoma. Both parties here are claiming the property under and by virtue of decrees of foreclosure of mortgages, of which mortgages

respondent's is prior in point of time. The appellant bases his claim to the machinery in question on the fact that his mortgage describes the real estate, together with the machinery and apparatus thereon situate, and claims that the property is personal property, and does not pass with the realty, and that he is entitled to the same as personalty under and by virtue of the description of the property in his mortgage, which, often describing the land, is as follows: "And the machinery and apparatus upon said premises at the time of giving said mortgage." Appellant claims that these words show an express intention to convey what he contends is personal property, which was not conveyed under respondent's mortgage conveying the real estate, together with the tenements, hereditaments, and appurtenances thereunto belonging. There is no claim that appellant's mortgage was ever filed or recorded as a chattel mortgage. The court below sustained respondent's motion to dismiss appellant's petition, and the appellant, having excepted to such ruling, prosecutes this appeal.

Of the major portion of the machinery and apparatus, the petition avers that "said machinery and apparatus can all be removed without injury to the freehold or to said machinery and apparatus; that there is no special adaptation of the real property to the said machinery and apparatus; that said machinery and apparatus are not attached to the walls of the said building, or in any way annexed in a permanent way to any part of said building; that said machinery and apparatus rest upon the floor of said building by means of iron legs, and are fastened to the floor, or to blocks set upon the floor, of said building, by screws or nails or bolts, for the purpose solely of steadying said machinery and apparatus when in use; and that said machinery and apparatus can be used for the purpose for which it was intended as well in any other place as where now located, and that said machinery and apparatus, although a portion thereof is connected with the shafting to said building by belting or otherwise, are all independent machines, complete in themselves, and that they are constructed after fixed patterns, and are solely implements bought and sold in gross, and in no way fixtures or part or parcel of the real estate, and that upon the removal of the said machinery and apparatus the value of the freehold would be unimpaired." Of the balance, consisting of chain blocks, belting, trucks, wrenches, tools, scales, safe, and stitching machines, etc., it is alleged that "none of it is affixed in any way or manner to the freehold." There is an immense mass of law learning upon the subject of fixtures, and the courts have striven to lay down some general rule by which the facts of each case might be tested, and the conclusion derived whether a particular thing, under certain circumstances, constituted a part of the realty or not; but no satisfactory rule has been devised, and probably never will be, owing to the difficulties inherent in the nature of the property itself. Between landlord and tenant many things are regarded as personal which might be considered a part of the realty as between vendor and vendee, mortgagor and mortgagee, or heir and executor. The older cases very generally hold to the idea that an actual physical annexation must be shown. But this strict rule of the old law has been much relaxed in favor of trade and manufacture, and the encouragement of new and constantly growing industries, and the doctrine of constructive annexation is not very generally, if not universally, recognized. And it is believed that any attempt to solve the question by applying the sole test of the character or extent of the actual annexation to the soil involves the question in many perplexing difficulties. In Johnson's Ex'r v. Wiseman, 4 Metc. (Ky.) 360, the court said: "The better opinion * * * is in favor of viewing everthing as a fixture which has been attached to the realty with a view to the purposes for which it is held or employed, however slight or temporary the connection between them. * * * The question whether chattels are to be regarded as fixtures depends less upon the manner of their annexation to the freehold than upon their own nature and their adaptation to the purposes for which they are used." In Helms v. Gilroy (Or.), 26 Pac. Rep. 851, the court say: "The weight of modern authority, keeping in mind the exceptions as to constructive annexation admitted by all the authorities to exist, seems to establish the doctrine that the true criterion of an irremovable fixture consists in the united application of several tests: (1) Real or constructive annexation of the article in question to the realty; (2) appropriation or adaptation to the use or purpose of that part of the realty with which it is connected; (3) the intention of the party making the annexation to make the article a permanent accession to the freehold, this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, and the policy of the law in relation thereto, the structure and mode of the annexation, and the purpose and use for which the annexation has been made." And we think that the "annexation" is not of necessity an absolute fastening or continued physical union in all cases. It is doubtful if any general rule can be formulated that will be applicable to all cases, and regard must be had to the particular circumstances of each case. The relationship existing between the parties, the nature of the article, and its use as connected with the use of the freehold, should not be lost sight of; but the annexation may be either actual or constructive, and the intention of the owner of the fee is often of the utmost importance in determining whether, in a given case, a chattel has become a fixture.

But, while the intention of the party affixing the machinery enters into the elements of each case, still such mere intention will not determine or alter its legal character, and whether or not, in a given case, it remains personalty or becomes

a fixture must depend upon the facts and circumstances, and not on his opinion. "Movable machines, * * * whose number and permanency are contingent on the varying circumstances of the business, subject to its fluctuating conditions, and liable to be taken in or out, as exigencies may require, are different in nature and legal character from the steam engines, boilers, shafting, and other articles secured by masonry, * * * designed to be permanent, and indispensable to the enjoyment of the freehold." Rogers v. Brokaw, 25 N. J. Eq. 497. In the case of Wolford v. Baxter, 33 Minn. 12, 21 N. W. Rep. 744, the court say: "While physical annexation is not indispensable, the adjudicated cases are almost universally opposed to the idea of mere loose machinery or utensils, even where it is the main agent or principal thing in prosecuting the business to which the realty is adapted, being considered a part of the freehold for any purpose. To make it a fixture, it must not merely be essential to the business of the structure, but it must be attached to it in some way, or, at least, it must be mechanically fitted so as, in ordinary understanding, to constitute a part of the structure itself. It must be permanently attached to, or the component part of, some erection, structure, or machine which is attached to the freehold, and without which the erection, structure, or machine would be imperfect or incomplete. The intent that they should remain * * * for permanent use is unimportant. Intent alone will not convert a chattel into a fixture." And this doctrine is reaffirmed in 35 Minn. 543, 29 N. W. Rep. 349, in the case of Farmers' Loan & Trust Co. v. Minneapolis Engine & Mach. Works, where it is held that machinery, to become part of the realty, must be either physically attached to it, or be, in ordinary understanding, a part of the building upon it; as where the building is constructed wholly or in part for the machinery, or the machinery is constructed for the building, or some part of it is fitted into it. In Hill v. Wentworth, 28 Vt. 429, it is held that not only the manner and extent, but the object and purposes, of the annexation of a chattel to a building, are to be considered in determining whether it has become a fixture and part of the realty. That the article is essential to the use of the building for the business for which it is used is not the test by which to determine whether or not it is a part of the realty. "To change the character of an article from a chattel to a fixture, there should be some positive act and intent to that effect on the part of the person annexing it to a building; and, if the intent is left in doubt upon an inspection of the property itself, taking into consideration its nature, the mode, extent, purpose, and object of its annexation, it should be held to remain personal property. Articles of machinery used in a manufactory do not become a part of the freehold when they are only attached to the building for the purpose of keeping them steadier, and in a manner best adapted to that purpose, so that their use as chattels may be more beneficial, and are attached in such a way that they may be removed without injury to the freehold or to the articles themselves as chattels." And in Keeler v. Keeler, 31 N. J. Eq. 181, the court says: "There appears to have been no special adaptation of these machines to the place where used, nor any preparation of a place to receive them. They are suitable and proper to be there, if such instruments were required for their proper work, but equally suitable and useful elsewhere. They were movable in the building. * * * They were constructed after fixed patterns for all purchasers,—things in gross, mere implements, heavy and complicated tools. If they ceased to be used in this factory, they were movable without alteration, without detriment to the building, and could be used equally well in another place, provided with power to drive them." In Cherry v. Arthur, 5 Wash. 787, 32 Pac. Rep. 744, this court said: "In ascertaining whether * * * a machine does become part of the realty, in favor of mortgagees, the rule is that the manner, purpose, and effect of annexation to the freehold must be regarded. If a building be erected for a definite purpose, or to enhance its value for occupation, whatever is built into it to further those objects becomes a part of it, even though there be no permanent fastening, such as would cause permanent injury if removed. But mere furniture, although some fastening be necessary to its advantageous use, is removable. Peculiarly subject to this rule are machines which can be used in one place as well as another, and which add nothing to the building, though they may be of advantage to the business conducted there." We are entirely satisfied with what is here said upon the subject, and think it best accords with reason and modern authority. Carpenter v. Walker, 140 Mass. 417, 5 N. E. Rep. 160; McConnell v. Blood, 123 Mass. 47; Wheeler v. Redell, 40 Mich. 693; Voorhees v. McGinnis, 48 N. Y. 278; Teaff v. Hewitt, 1 Ohio St. 511; Manufacturing Co. v. Garven, 45 Ohio St. 290, 13 N. E. Rep. 493; Murdock v. Gifford, 18 N. Y. 28; Manwaring v. Jenison, 61 Mich. 117, 27 N. W. Rep. 899; Balliett v. Humphreys, 78 Ind. 388. In the case of Manufacturing Co. v. Garven, *supra*, the court say: "It has generally been held in this country that articles of machinery used in a factory for manufacturing purposes, only attached to the building to keep them steady in their places, so that they may be more serviceable when in use, and that may be removed without any essential injury to the freehold or the articles themselves, are personal property, and do not pass by a conveyance or mortgage of the freehold." And in Murdock v. Gifford, *supra*, it was said that "all that part of the gearing or machinery which has special relation to the building with which it is connected would belong to the freehold, while an independent machine, like a loom, which, if removed, still remains a loom, and can be used as such wherever

it is wanted, and power can be applied to it, will still retain its character of personalty." We do not think that mere adaptability of machinery to use in the business which happens to be conducted upon the realty is of itself enough to give the character of realty to the machinery. To constitute machinery and apparatus fixtures, it is not alone sufficient that they be placed in the shop or factory with the intent that they should remain there for permanent use, but the intent must be to make them a permanent accession to the freehold. We are not unmindful of the fact that there is much authority opposed to the views herein expressed, but it is believed that a review of the cases in detail would serve no useful purpose.

Respondent insists, however, that the appellant is not entitled to hold or claim any portion of the property here in dispute, for the reason that appellant's mortgage was not executed and recorded in compliance with the statute governing chattel mortgages. Section 1648, 1 Hill's Code, provides: "A mortgage of personal property is void as against creditors of the mortgagor or subsequent purchaser, and incumbrances of the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay, or defraud creditors, and it is acknowledged and recorded in the same manner as is required by law in conveyance of real property." And the following section requires that a mortgage of personal property should be recorded in the office of the county auditor of the county in which the mortgaged property is situated, in a book kept exclusively for that purpose. We think, however, that respondent's contention in this regard is fully met by the case of Darland v. Levins, 1 Wash. St. 582, 20 Pac. Rep. 309, in which the court held that the sole purpose of the statute requiring chattel mortgages to be recorded is to give notice by the record to subsequent purchasers or mortgagees of the property; and what is said of the failure to record a chattel mortgage is applicable to a case where the mortgage is unaccompanied by the affidavit of the mortgagor provided by section 1648. Without such affidavit it would be good as against the mortgagor and all others, excepting "creditors of the mortgagor or subsequent purchasers or incumbrances of the property for value." Other points urged in the respondent's brief are inapplicable to the record here presented, and for that reason we must decline to discuss them. The judgment and order appealed from will be reversed.

NOTE.—*Late Decisions on Subject of Machinery as Fixtures, as between Mortgagor and Mortgagee.*—A mortgagee of a stone quarry was entitled to certain appliances, such as steam-boilers, engines, derricks, etc., which had been actually fastened to the ground by the owner of the fee, and were used directly in the quarrying and shipping of stone, the only purpose for which the land was valuable. Speiden v. Parker (N. J.), 19 Atl. Rep. 21, 46 N. J. Eq. 292. A boiler in a mill, resting on brick foundations, and looms resting on the floor and only fixed by their own weight, and connected with the machinery of the mill by belting, are fixtures as between a mortgagor and mortgagee of the premises. Cavis v. Beckford, 62 N. H. 229. Machinery for manufacture of cotton cloth, placed in a cotton-mill subject to a mortgage, becomes realty, as against the mortgagor and his grantees, where it is heavy, and not intended to be moved from place to place, but fastened in position to be used until worn out, or the use of the building is changed, though it is designed to manufacture a different kind of cloth from that made when the mill was mortgaged. Hopewell Mills v. Taunton Sav. Bank (Mass.), 23 N. E. Rep. 327, 150 Mass. 519. Where looms are attached in such manner as to become realty, the loom beams are also realty, though not fastened to the looms, but laid upon them when in use. Hopewell Mills v. Taunton Sav. Bank (Mass.), 23 N. E. Rep. 327, 150 Mass. 519. An engine and boiler in a manufactory which are used to propel the machinery, and are fastened to a stone and brick foundation let into the ground three feet, together with the shafting, pulleys, and beltings, pass, as fixtures, to a purchaser on foreclosure sale of the building, as against an execution creditor of the mortgagor, though the engine and boiler were not in the building when the mortgage was executed, nor when it was transferred to the assignee who foreclosed. Doughty v. Owen (N. J.), 19 Atl. Rep. 540. Machinery placed in a building for the purpose of supplying it with electric light, without any intention to annex it to the realty, does not pass to a purchaser of the realty, at a foreclosure sale. Vail v. Weaver (Pa.), 19 Atl. Rep. 138, 132 Pa. St. 363. As between mortgagor and mortgagee, machinery necessary for, and used in the operation of, a sash and door and planing mill, when affixed to the building by screws, bolts, pulleys, and bands, is a part of the realty, and subject to the mortgage lien. Heims v. Gilroy (Oreg.), 26 Pac. Rep. 851. The facts that shelving and counters in a store are nailed to the building, that they are necessary for the use of the premises as a store, and have been so used for 20 years, do not constitute them part of the realty as between mortgagor and mortgagee, where there is no evidence as to the intention of the owner of the building to treat them as fixtures. Johnson v. Moser (Iowa), 47 N. W. Rep. 996. A mortgage covered a grist mill, with all the fixtures, etc., upon the premises for making and storing cider, and manufacturing or making vinegar. Held, that an Acme oil-engine, cider-mill, grinder, presses, paring machines, belts, shafting and pease-slicer, were "fixtures," within the meaning of the mortgage. Hathaway v. Orient Ins. Co., 11 N. Y. S. 413, 58 Hun, 602. All the machinery used in an agricultural implement factory being either fastened to the building or heavy enough to remain in place of itself, and operated by belt or gearing attached to a shaft, is part of the realty, and passes under a mortgage of the land on which the plant is situate. Calumet Iron & Steel Co. v. Lathrop, 36 Ill. App. 249. Defendants admitted plaintiffs into partnership and joint possession with themselves of a factory, their business homestead, plaintiffs, making a cash payment, and defendants and their wives executing a deed of half of the property, to be delivered when plaintiffs had made the entire payment. This payment was never made, and the money which was paid was returned, and the trade was voluntarily rescinded. The partnership was dissolved, and notes were given by defendants to plaintiffs for a balance due on their partnership account, secured by a deed of trust on certain machinery in the factory. Held,

that whether this machinery was put in the factory by plaintiffs or by defendants, if it was attached to the factory with the intention of using it permanently as a part of the same, and if it was adapted to such use, it would be a fixture, and part of the homestead, and therefore not subject to the deed of trust. Phelan v. Boyd (Tex.), 14 S. W. Rep. 290. A member of a firm operating a door, sash, and blind factory borrowed money of plaintiff for the purpose of his business, and gave him a mortgage on land owned by such member, and on which the factory stood, "together with all the machinery and buildings on said lot, consisting of one engine," etc. Subsequently the engine was sold and another purchased under a contract that title thereto was to remain in the vendor until it was paid for. The factory was burned, and all the machinery removed and set up on other premises. After such removal, the firm gave mortgages on the machinery to different persons. The machinery, when first put in position, was not intended as a permanent improvement, but only to remain so long as the business was profitable. Held, that neither the engine nor the machinery could be followed by plaintiffs as part of the real estate covered by their mortgage. Padgett v. Cleveland (S. Car.), 11 S. E. Rep. 1069, 33 S. Car. 339. Defendant sold certain machinery to a person who placed it on his mortgaged premises, affixing it to the freehold, under an agreement that the same should not become a part of the realty, but should retain its character as personal property, and that title thereto should remain in defendant until he should be paid the purchase price thereof in full. Defendant went on the premises, and removed the mortgage, after foreclosure of the mortgage. Held, in an action by the purchaser at the foreclosure sale for wrongful taking and conversion, that plaintiff acquired no title to the machinery as against defendant. Brand v. McMahon, 15 N. Y. S. 39. Seven years after a mortgage was executed the mortgagor placed on the premises a boiler, saw-rig, shingle-mill, and planer, which could be removed without injury to the freehold. He did not disclose to the mortgagee his intention that they should not become permanent accession to the freehold, but it was customary to put such articles on land and remove them at will. Held, that they were not fixtures. Choate v. Kimball, (Ark.), 19 S. W. Rep. 108. Mill property containing machinery adapted to its use was conveyed, and a mortgage given for the purchase price. At the same time the vendor gave a bill of sale of the machinery and took back a chattel mortgage thereon. Subsequently the purchaser added machinery of permanent character. Held, that the machinery passed as realty by the conveyance, and was included in the mortgage of the real estate, and the bill of sale and chattel mortgage did not change its character to personalty, and that the permanent machinery thereafter added also became subject to the mortgage. Cooper v. Harvey, 16 N. Y. S. 660, 62 Hun, 618. As between mortgagor and mortgagee, a "bar" fastened by nails and screws to the wall and floor of a building used by the mortgagor as a saloon is a part of the realty. Woodham v. First Nat. Bank (Minn.), 50 N. W. Rep. 1015. Milling machinery placed in a mill building by the owner for the permanent purposes of the mill, so that its removal would injure the building and impair its usefulness for mill purposes, and lessen its value as real estate, is a part of the realty, as between the owner and a mortgagee of the realty; and the fact that the owner subsequently gave a chattel mortgage on such machinery, and that the mortgage was assigned to a third person, and by the latter to the mortgagor, only restores him to his original rights, and gives him no better title than he previously had. Phœnix Mills v. Miller, 17 N. Y. S. 158, 62 Hun, 621. The owner of premises, who had erected a slaughterhouse thereon, sold them to B for slaughterhouse purposes, taking a purchase-money mortgage. B erected machinery thereon, and operated the premises as a slaughterhouse. The property was sold under the mortgage and B rented it of the purchaser. Held, that the machinery passed to the purchaser as a part of the realty. Kloess v. Katt, 40 Ill. App. 99. As between a mortgagor of chattels, who authorizes their annexation to a mill, and who merely files his mortgage in the chattel mortgage records, and a subsequent mortgagee of the mill, after annexation thereto of the chattels, consisting of an engine and other machinery, the latter, having no knowledge of the claim of the other, has the superior title. Tibbetts v. Horne, 23 Atl. Rep. 145, 65 N. H. 242. A planing machine, which is bolted to the floor of a saw-mill, so as to keep it from moving, and which has no connection with the motive power except by a belt over a pulley wheel, is not part of the realty as between one who has delivered it to the owner of the mill upon conditional sale and a mortgagee of the realty to secure a pre-existing debt. Cherry v. Arthur, 32 Pac. Rep. 744, 5 Wash. St. 787. The owners of certain machinery entered into a written contract with a mining company to set up machinery on the land of the latter, and take notes therefor secured by chattel mortgage on the machinery. On the same day the mining company executed a mortgage on the land, containing a clause that it was subject to the chattel mortgage. Held, that, since it appeared to be the intent of the parties that the machinery should remain personal property, it retained its personal character, and was not subject to the real estate mortgage. Ellison v. Salem Coal & Min. Co., 43 Ill. App. 120. Casks in a brewery which are nine feet high and seven feet in diameter, so large as not to be removable from the building without making a hole in the floor, and used in the process of manufacturing beer, are fixtures, and pass under a mortgage of the land, together with all improvements and "all machinery used in and for the brewery," established thereon. Meyer v. Orynski (Tex. Civ. App.), 25 S. W. Rep. 655. Radiators and valves which may be readily detached from the distributing pipes by which a company supplies a dwelling with steam for heating purposes are not part of the realty, though the owner of the house, when he put them in, had an undisclosed intention of making them such. National Bank v. North, 28 Atl. Rep. 694, 160 Pa. St. 303. Machines placed in a shoe factory, and fastened to the building, are, as between, the vendor of the machines and a mortgagee of the realty, fixtures passing under the mortgage, especially where the vendor had notice when he sold the machines that the vendee held title to the land under a deed which declared that improvements and machinery to be placed thereon should not be removed for five years. Fifield v. Farmers' Nat. Bank (Ill. Sup.), 35 N. E. Rep. 803, 148 Ill. 163. Whatever tools are part of the machinery necessary to the operation of a factory are fixtures, and, as such, are covered by a mortgage of the factory. Huston v. Clark (Pa. Com. Pl.), 3 Pa. Dist. R. 2. Defendant, who owned an undivided interest in a mill, entered into a partnership with one M to conduct the milling business. The partners put into the mill new machinery, which was paid for partly in cash, furnished by defendant under the partnership agreement, and partly with notes of the firm. None of the machinery was built into the mill, but it was

attached by cleats, screws, and in some instances by braces. Held, that such machinery did not become fixtures, so as to pass under a mortgage by defendant of his interest in the mill. Borland v. Hahn, 25 N. Y. S. 131, 7 Hun, 597. A mortgage on real estate used as a foundry and machine shop covers machinery which was placed by the owner in a building erected by him many years before foreclosure of the mortgage, though some of the machines were not fastened to the soil, because they were so heavy it was not necessary; especially where the parties understood that such property was covered by the mortgage. Smith v. Blake, 55 N. W. Rep. 978, 96 Mich. 542.

See, also, 10 Lawyers' Reports, Annotated, 723, note, for a full discussion of this subject. See, also, articles in 26 Cent. L. J. 216, and 32 Cent. L. J. 202.

BOOKS RECEIVED.

The United States Internal Revenue Tax System embracing all Internal Revenue Laws now in force as amended by the latest Enactments including the Income Tax of 1894 and 1864, with rulings and regulations. The whole copiously annotated with references to the decisions of the Courts and the Departments, and cross-references with an introductory historical sketch of Internal Revenue taxation in the United States and an appendix containing laws relating to Internal Revenue practiced, with forms. Edited by Charles Wesley Eldridge, member of the Bar of the Supreme Courts of Massachusetts and California and for twenty-five years in the Internal Revenue Service. Boston and New York: Houghton-Mifflin Company. 1895.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATION—Accounts of Executor—Deposit in Insolvent Bank.—An executor who deposited in a bank in his own name, and on his own responsibility, money belonging to the succession, should, on the failure of the bank, be charged with the deposit.—SUCCESSION OF MILMO, La., 16 South. Rep. 772.

2. ADMINISTRATION—Claims against Decedent.—Under Mills' Ann. St. § 4780, providing that all "demands" against a decedent's estate, not presented within one year after notice, shall be barred, the failure to present within such time a claim secured by a mortgage on land does not bar the mortgagee's right to subject the land to the payment of the claim.—REID v. SULLIVAN, Colo., 39 Pac. Rep. 338.

3. ACTION—Lease by State — Parties.—Where, in a suit for an injunction, it appears that the State is an indispensable party, the court has no jurisdiction of the suit, on refusal of the State to appear.—COLUMBIA WATER POWER CO. v. COLUMBIA ELECTRIC STREET RAILWAY, LIGHT & POWER CO., S. Car., 20 S. E. Rep. 1002.

4. ADVERSE POSSESSION—Judgment in Ejectment.—Where, after title is acquired by adverse possession, the holder thereof loses the actual possession, he may maintain an action to regain it as if he had a perfect paper title.—SUTTON v. POLLARD, Ky., 29 S. W. Rep. 637.

5. APPEAL—Writ of Error.—After decision on appeal, appellees cannot bring the same judgment to the Appellate Court for review on writ of error.—HARRIS v. SIMMANG, Tex., 29 S. W. Rep. 668.

6. ASSIGNMENT FOR CREDITORS — Validity.—An assignment for creditors, which expressly excludes from its benefits some of the assignor's creditors, is void.—STEVENS v. MOSCONI, Colo., 39 Pac. Rep. 348.

7. ASSIGNMENT BY CORPORATE PRESIDENT — Insurance.—An assignment of an insurance policy by a corporation, by its president and general manager, who, with one other, who advised and ratified the assignment, owned all the corporate stock, is valid.—GLOVER v. ROCHESTER GERMAN INS CO., Wash., 39 Pac. Rep. 380.

8. ASSIGNMENT OF MONEY TO BE EARNED.—An assignment of moneys not yet earned, but expected to be earned in the future, under an existing contract, is in equity valid and enforceable. — PERKINS v. BUTLER COUNTY, Neb., 62 N. W. Rep. 308.

9. ASSIGNMENT—Suit by Assignee—Party in Interest.—The assignee of a claim may sue thereon as the "real party in interest," though the assignment is on condition that when the claim is collected the whole, or some part, must be paid over to the assignor.—GOMER v. STOCKDALE, Colo., 39 Pac. Rep. 356.

10. ATTACHMENT — Appearance. — Under Code, § 263, providing that in all cases the defendant, or any person who establishes a right to the property attached, may move to discharge the attachment, a creditor attaching his debtor's property, but not claiming it except under the attachment, cannot question the regularity of another attachment against the same.—PHILLIPS & BUTTORFF MANUF'G CO. v. RAY, S. C., 20 S. E. Rep. 980.

11. ATTACHMENTS—Elements of Damage.—Attorney's fees are not a proper element of damages for wrongfully suing out attachment or injunction writs and obtaining impounding orders, even where they are capable of being apportioned so as to show the amount incurred for the attachments and injunctions, as separate and distinct from the other services necessary in the case.—STRINGFIELD v. HIRSCH, Tenn., 29 S. W. Rep. 609.

12. BANKRUPTCY — Title of Assignee.—An assignee in bankruptcy takes no title to real estate, under section

6046, Rev. St. U. S., as against a grantee in a prior unrecorded deed, good as against the bankrupt himself, in the absence of actual fraud upon creditors in the making of such deed.—LAUGHLIN v. CALUMET & CHICAGO CANAL & DOCK CO., U. S. C. C. of App., 65 Fed. Rep. 44.

13. CARRIER OF PASSENGER — Improper Conduct.—Where the refusal of employees in charge of a steamboat to put a passenger off at the destination for which she bought a ticket was willful, or the result of gross or intentional neglect by the employees, or if their conduct in refusing to do so was in any way insulting towards the passenger, the owner of the boat is liable in punitive damages.—MEMPHIS & C. PACKET CO. v. NAGEL, Ky., 29 S. W. Rep. 743.

14. CARRIERS OF PASSENGERS — Street Railway—Injury.—The rear car of an electric railway train was just passing over the further crosswalk at a street crossing, at which the city ordinance required it to stop for passengers, and was running three miles an hour, when plaintiff came on the street. Plaintiff, intending to board the train, ran towards the motor car, but was not seen by the conductor until within 10 feet of the car. There was no slacking of speed or other act showing any intention on the part of the conductor or motorman to accept him as a passenger: Held, that by his attempt to board the train he did not become a passenger so as to require of the railway company the highest degree of care to avoid injuring him.—SCHEPERS v. UNION DEPOT R. CO., Mo., 29 S. W. Rep. 712.

15. CHATTEL MORTGAGES — Enforcement. — Where household goods are attached, and the holder of a chattel mortgage thereon for an amount in excess of the value of the goods intervenes, a judgment in favor of the intervener need not find the value of each article.—JOSLIN v. MCGEE, Colo., 39 Pac. Rep. 349.

16. CONTRACTS—Consideration.—A promise to a person entitled to a distributive share in excess of the other distributees, on account of advancement to them, to pay the excess if he will forbear to enforce his claim therefor, is based on a sufficient consideration.—FAIN v. TURNER'S ADM'R, Ky., 29 S. W. Rep. 628.

17. CONTRACT OF EMPLOYMENT.—Where it was shown that plaintiff continued his duties as manager of defendants' plantation for some time after his contract for one year had expired, and until defendants sold the plantation, the presumption that there was a tacit reconduction of the contract for another year is removed by proof that before his contract had expired plaintiff knew that defendants intended to sell the property, and was informed by defendants that, in case a sale was made, his services would no longer be needed, and that only in case no sale was made would they re-employ him.—BURTON v. BEHAN, La., 16 South. Rep. 769.

18. CONSTITUTIONAL LAW—Right to Jury Trial.—The Circuit Courts have no power to hear, on their law side, petitions for partition of lands, under a State statute which provides for the determination of questions arising in such proceedings without a jury, since actions for partition are among the suits at common law in which, under the constitution of the United States, trial by jury is preserved; but jurisdiction may be taken in equity, partition being a recognized head of equity jurisprudence.—KLEVER v. SEAWALL, U. C. C. C. of App., 65 Fed. Rep. 394.

19. COURTS—Duration of Term.—A term of court does not lapse or terminate before the limit set by law for its continuance, because of the absence of the judge assigned to hold it, on a day to which its session has been adjourned for convenience in the transaction of business, though no written order adjourning such term is made.—SCHOFIELD v. HORSE SPRINGS CATTLE CO., U. S. C. C. (Mont.), 65 Fed. Rep. 433.

20. CRIMINAL EVIDENCE—Assault.—On trial of several persons charged with riot and assault and battery, the assault consisting of taking the prosecuting witness to a woods and whipping him, the State may show that defendants were members of a secret society.—STATE v. JOHNSON, S. Car., 20 S. E. Rep. 988.

21. CRIMINAL EVIDENCE—Incest—Prior Acts.—On a prosecution for incest, evidence is admissible of illicit relations between the parties prior to the specific offense charged, though such evidence discloses other indictable offenses of like nature, barred by the statute.—COMMONWEALTH v. BELL, Penn., 31 Atl. Rep. 121.

22. CRIMINAL EVIDENCE—Murder—Confessions.—On a trial for murder, a written statement voluntarily made by defendant after his arrest is admissible to connect him with the crime.—STATE v. MURRAY, Mo., 29 S. W. Rep. 700.

23. CRIMINAL LAW—Adultery.—Under How. Ann. St. § 9279, providing that no prosecution for adultery shall be commenced but on the complaint of the husband or wife, a married man who commits adultery with a married woman may be proecuted by the husband of his paramour.—WILSON v. GRATIOT CIRCUIT JUDGE, Mich., 62 N. W. Rep. 298.

24. CRIMINAL LAW—Bail — Defenses.—Where the accused was held by a justice for a felony to the Circuit Court, and the bond recited every jurisdictional fact, the sureties cannot allege as a defense that the accused was first taken before the mayor, who had no jurisdiction.—HARRIS v. STATE, Ark., 29 S. W. Rep. 762.

25. CRIMINAL LAW — Cemeteries — Removing Structures. — An indictment for willfully removing gates from a certain cemetery, in violation of Rev. St. 1894, § 2041 (Rev. St. 1881, § 1962), which provides that whoever willfully removes any fence or other work in or around any "public or private" cemetery or burial place shall be fined, etc., is sufficient, though it does not state that such cemetery was either a public or private one.—LAY v. STATE, Ind., 39 N. E. Rep. 768.

26. CRIMINAL LAW—Charge—Confession.—In a criminal trial it was proper to refuse to charge that evidence of a verbal confession by defendant should be received with great caution, as it was for the jury to determine the effect of such evidence.—BOBO v. STATE, Miss., 16 South. Rep. 755.

27. CRIMINAL LAW — Larceny — Description. — Under Code Proc. § 1253, providing that in an information for larceny of money it is sufficient to allege the larceny to be of money, without specifying the coin, number, denomination, or kind thereof, an information charging larceny of a certain number of dollars, "lawful money of the United States," is sufficient. — STATE v. BLANCHARD, Wash., 39 Pac. Rep. 377.

28. CRIMINAL LAW — Misconduct of Jury — Intoxication.—Where a jury purchased whisky, and "some of them were under its influence" while deliberating on their verdict, a new trial will be granted.—STATE v. JENKINS, N. Car., 20 S. E. Rep. 1021.

29. CRIMINAL LAW—Homicide.—Where three persons form a design to kill a person, and one of them provokes a difficulty with him to furnish a pretext for killing him, he is equally guilty with the other two, who inflict the wounds.—STATE v. PAXTON, Mo., 29 S. W. Rep. 705.

30. CRIMINAL LAW—Homicide—Self-Defense.—Where deceased was driving in a deep cut, when defendant, who was upon one of the banks above, fired upon him, as he claimed, in self-defense, it was proper to refuse a request to charge as to self-defense which omitted the element of necessity to take the deceased's life.—STATE v. CORLEY, S. Car., 20 S. E. Rep. 989.

31. CRIMINAL LAW — Murder — Self-Defense. — Where defendant, in a fight with deceased, drew a pistol and shot him, the court properly refused to charge that, to deprive defendant of the right of self-defense, he must have procured the pistol with intent to bring on the difficulty, and use it therein in overcoming or slaying deceased, if necessary, it being enough that defendant intended to use the weapon in inflicting great bodily harm upon deceased or in committing a felony.—HUNT v. STATE, Miss., 16 South. Rep. 754.

32. CRIMINAL LAW—Removal of Mortgaged Property.—In a prosecution for disposing of mortgaged property it is error, in the absence of other evidence, to hold that a paper reciting that defendant, in consideration of certain money "advanced," has bargained and sold to M certain property, to be delivered on demand, is a mortgage.—STATE v. RICE, S. Car., 20 S. E. Rep. 986.

33. CRIMINAL PRACTICE — Federal Offense.—The offense defined in the first clause of section 5421, Rev. St., relating to falsely making, altering, forging, or counterfeiting any deed, certificate, or other writing, for the purpose of obtaining from the government any sum or sums of money, includes not only the technical execution of such an instrument, but the making of an affidavit or certificate which is genuine itself, but contains false statements.—UNITED STATES v. HARTMAN, U. S. D. C. (Mo.), 65 Fed. Rep. 490.

34. CRIMINAL PRACTICE — Federal Offense.—An indictment under section 5209, Rev. St. U. S., for embezzlement, which charges that the defendant did have and receive "certain of the moneys and funds of said national banking association of the amount and value of $7,123.93," is defective in not stating with sufficient definiteness what the property was which defendant is accused of misappropriating, "funds" being a word including several species of property.—UNITED STATES v. GREVE, U. S. D. C. (Mo.), 65 Fed. Rep. 488.

35. CRIMINAL PRACTICE—Federal Offense.—An indictment for violation of section 3894, Rev. St. U. S., imposing a plenalty for depositing, in the mail, matter concerning a lottery, gift concert, or other similar enterprise which does not set out in its charging part, with particularity, distinctness, and completeness, the scheme in the carrying out of which such matter was deposited in the mail, is fatally defective. — UNITED STATES v. MACDONALD, U. S. D. C. (Mo.), 65 Fed. Rep. 486.

36. CRIMINAL PRACTICE—Indictment.—Proof that defendant stole a mare will sustain an averment that he stole a horse.—STATE v. GOOCH, Ark., 29 S. W. Rep. 640.

37. DESCENT—Distribution of Personalty.—To enable personal property to retain its ancestral character so as to descend to the ancestral side, from which intestate received it, it must have remained until intestate's death the same in specie as when received by him. The fact that the change in the form of the personal property occurred while in the hands of the executor of intestate's ancestor or of intestate's guardian, intestate never having had control of the property, does not prevent it from losing its ancestral character.—ROUNTREE v. PURSEL, Ind., 39 N. E. Rep. 747.

38. DESCENT AND DISTRIBUTION—Heirs—Half Blood.—Burns' Rev. St. 1894, § 2625 provides, if there be neither father nor mother, the brothers and sisters of the intestate living, and the "descendants" of such as are dead, shall take the inheritance. Burns' Rev. St. 1894, § 2627 provides that kindred of the half blood shall inherit equally with those of the whole blood: Held, that "descendants" of the half blood take equally with those of the whole blood.—ANDERSON v. BELL, Ind., 39 N. E. Rep. 735.

39. DESCENT AND DISTRIBUTION — Slave Marriages.—Where slave marriages have terminated before, or have never been recognized by the parties therto after, they became free persons, the offspring thereof have no inheritable blood. They cannot inherit property acquired by their ancestors after emancipation.—WILLIAMS v. KIMBALL, Fla., 16 South. Rep. 783.

40. DIVORCE—Husband's Personal Estate.—"Dower," as used in Rev. St. § 4526, providing that, if any woman be divorced from her husband for his fault or misconduct, she shall not thereby lose her dower, does not include the share of the personal estate of the husband to which a widow is entitled under Rev. St. § 4517.—WEINDEL v. WEINDEL, Mo., 29 S. W. Rep. 715.

41. DIVORCE—Support of Children.—Where a divorce *a vinculo* has been granted to a husband on account of the aggression of the wife, and the minor children of the parties assigned to the custody of the divorced wife, without an order respecting their maintenance, and while so in her custody she furnished to them necessaries, she cannot recover against her former husband, their father, for her expenditures in this behalf, in the absence of proof of a promise by him to pay for such necessaries, or of a request that they should be furnished to the children.—FULTON v. FULTON, Ohio, 39 N. E. Rep. 731.

42. EQUITY — Public Lands. — Equity has no power to determine any question affecting the title to public lands, until the land department has determined the matter, and the title has passed from the government.—MATTHEWS v. YOUNG, Okla., 39 Pac. Rep. 388.

43. EQUITY — Physician and Patient. — A physician who also acts as agent and confidential adviser of his patient, a woman 70 years of age, has the burden of proving that a deed conveying all her real estate to him, in trust for herself for life, and thereafter to himself, was fairly and honestly obtained, and that the transaction is above suspicion.—UNRUH v. LUKENS, Penn., 31 Atl. Rep. 110.

44. EQUITY—Variance between Bill and Decree.—Where a bill prays that defendant may be restrained from selling a certain "matrik" without accounting to complainant as provided for by a certain contract, and the decree is to the effect that the "matrices" made by defendant are within the contract, the fact that the decree uses the plural does not constitute a variance from the prayer of the bill; the word "matrices" referring to members of the same species, and not different kind of matrices.—STRATTON v. SEAVERNS, Mass., 39 N. E. Rep. 780.

45. ESTOPPEL BY DEED—Evidence.—A want of consideration cannot be shown, against a recitation in the deed, to establish a resulting trust.—WEISS v. HEITKAMP, Mo., 29 S. W. Rep. 709.

46. EVIDENCE—Parol Evidence.—Where thereis no ambiguity patent on the face of a deed, parol evidence is admissible to explain any ambiguity that may arise from an application of the description in the deed to the land conveyed.—WEBB v. FRAZAR, Tex., 29 S. W. Rep. 665.

47. FRAUDS, STATUTE OF—Agreement Relating to Land—Plaintiff's testator stated to the husband of defendant, his sister, that he intended to give her a home, and told him to build on certain land a house costing a certain sum, and he would pay for it. The husband built a house costing more than the amount named by testator, paying the excess himself, and made other permanent improvements, to testator's knowledge. Afterwards, when the husband was contemplating moving, testator told him that if defendant left the house she would forfeit her right to it, whereupon he remained: Held, that there was such part performance as took testator's agreement out of the statute, though the rental value of the premises during defendant's occupancy exceeded the amount expended by the husband.—YOUNG v. OVERBAUGH, N. Y., 39 N. E. Rep. 712.

48. FRAUDS, STATUTE OF—Promise to Pay Rent.—The fact that a person rents a house for the use of another does not make his promise to pay the rent an agreement to pay the debt of another.—SHAFER v. CHERRY, Colo., 39 Pac. Rep. 345.

49. FRAUDULENT CONVEYANCES — Community Property.—Where execution on a judgment in favor of a creditor of the community estate of a husband and wife was returned unsatisfied, a deed to the wife of land formerly community property, made without consideration, and after the debt of such creditor accrued, will be set aside, and the land subjected to the satisfaction of the judgment, in the absence of evidence of sufficient other property belonging to the community to satisfy the claim.—KLOSTERMAN v. HARRINGTON, Wash., 39 Pac. Rep. 376.

50. FEDERAL COURTS—Jurisdiction—Diverse Citizenship.—Jurisdiction of a Circuit Court on the ground of the citizenship of the parties to an action brought therein is not shown of record by allegations in plaintiff's petition which merely describe defendants as "all residents of" a certain place within the district in which suit is brought, plaintiff being described as a "resident citizen" of a different State.—COOPER V. NEWELL, U. S. S. C., 15 S. C. Rep. 355.

51. GARNISHMENT — Liability of Bank.—In garnishment against a bank it appeared that defendant had been accustomed to deposit with the bank drafts drawn on customers, and receive credit therefor on account, and it was agreed that, if any drafts were dishonored, the bank should charge them back to defendant. The bank claimed that defendant agreed to keep at all times $1,000 on deposit to cover such returned drafts: Held, that the fact that the amount to defendant's credit in the bank was often less than $1,000 was insufficient to show that no such contract existed, since it was not inconsistent with such contract.—RICE V. THIRD NAT. BANK OF DETROIT, Mich., 62 N. W. Rep. 295.

52. HOMESTEAD — Evidence.—On an issue as to whether a person bought a lot intending to make it his homestead, evidence that, after the lot was sold under execution against such person, he built a house thereon, and moved into it with his family, is admissible.—GALLAGHER V. KELLER, Tex., 29 S. W. Rep. 646.

53. HUSBAND AND WIFE — Community Property—Sale under Judgment.—A judgment for costs against a firm in an action to reform a lease of land to such firm may be enforced against the community land of a member of the firm and his wife, in the absence of a showing that the firm's business was not for the benefit of the community, and that it has sufficient available property to satisfy the judgment.—DIAMOND V. TURNER, Wash., 39 Pac. Rep. 379.

54. HUSBAND AND WIFE—Wife's Separate Estate.—A husband, who is the general manager of his wife's store, has not implied authority to execute in her name a note in payment for goods previously purchased.—WITZ V. GRAY, S. Car., 20 S. E. Rep. 1019.

55. INSOLVENT LAW—Application to Nonresident.—Assuming that a nonresident debtor owning property in this State cannot make an assignment under our insolvency laws, because of the provisions of Gen. St. 1878, ch. 41, § 23, unless he has carried on business within our borders, and, consequently, that a receiver cannot be appointed for his estate in accordance with Gen. Laws 1881, ch. 148, § 1, as amended, no hard and fast rule can be formulated for determining whether he has carried on such business.—ROLLINS V. RICE, Minn., 62 N. W. Rep. 325.

56. INSURANCE—Condition against Mortgage Incumbrances.—In record of a chattel mortgage does not charge an insurer with notice thereof, so as to render a failure to cancel a policy on the property a waiver of a condition against mortgage incumbrances.—MILWAUKEE MECHANICS' INS. CO. V. NIEWEDDE, Ind., 39 N. E. Rep. 757.

57. INSURANCE—Submission to Arbitration.—Where a trustee of an express trust for the management of real estate takes out a policy of insurance, and agrees to submit the amount of loss to arbitration, his death before an award is made does not revoke the submission.—CITIZENS' INS. CO. OF EVANSVILLE V. COIT, Ind., 39 N. E. Rep. 766.

58. INSURANCE — Statements in Application.— After the issue of a policy, which provided that representations in an application, if any should be made, should constitute warranties, the insurer refused to ratify the action of his agents who issued the policy in consenting to the removal of the goods unless an application was made by insured: Held, that the representations in the application thereupon made by insured did not constitute warranties.—LIVERPOOL & LONDON & GLOBE INS. CO. V. STERN, Tex., 29 S. W. Rep. 678.

59. INTOXICATING LIQUORS—Evidence.—On a prosecution for maintaining a liquor nuisance, it is proper to admit evidence by police officers that they found men sitting in defendant's kitchen with bottles of lager beer; that defendant was also in the room; and that witnesses took the beer from the men, who objected, and said, in defendant's hearing, that they had paid for the beer, and the witnesses ought not to take it.—COMMONWEALTH V. MCCABE, Mass., 39 N. E. Rep. 777.

60. INTOXICATING LIQUOR—Illegal Sale of Liquor.—In a prosecution against the servant of an innkeeper for the unlawful sale of liquor, the fact that the sale was innocently made, under the belief that the persons to whom the liquor was sold were guests, is no defense.—COMMONWEALTH V. GREEN, Mass., 39 N. E. Rep. 775.

61. INTOXICATING LIQUOR—Regulation.— Mills' Ann. St. § 4403, subd. 18, gives to an incorporated town the exclusive right to license or prohibit the sale of liquor within one mile beyond its boundaries. Mills' Ann. St. ch. 76, gives a general authority to the boards of county commissioners to grant licenses for the sale of liquor: Held, that the fact that a county license was issued to one selling liquor within a mile of an incorporated town did not exempt him from the operation of an ordinance of the town thereafter passed, requiring a license to be paid by those selling liquor within that distance of the town.—PEOPLE V. RAIMS, Colo., 39 Pac. Rep. 341.

62. JUDGMENT CREDITORS — Purchase at Execution Sale.—Where there is a resulting trust in lands in favor of the wife of a judgment debtor, in whose name the title stands, the judgment creditor purchasing at the execution sale with notice of the trust gets no greater rights against the wife than those possessed by the husband.—MILLER V. BAKER, Penn., 31 Atl. Rep. 121.

63. JUDGMENT—Evidence.—A judgment of a court of a sister State, authenticated as prescribed by act of congress is conclusive here upon the subject matter of the suit. An action thereon can only be defeated on the ground that the court had no jurisdiction of the case, that there was fraud in procuring the judgment, or by defenses based on matters arising after the judgment was rendered.—SNYDER V. CRITCHFIELD, Neb., 62 N. W. Rep. 307.

64. LANDLORD AND TENANT—Assignment of Lease.—Where a landlord and mortgagee each claim priority of lien on chattels belonging to the assignee of the lessee, the landlord may introduce the lease in evidence, though it contains a condition that the lessee shall not assign it without the landlord's permission, as it will be presumed that the assignee, by taking possession, assumed towards the lessor the relation of tenant under the lease.—ROGERS V. GRIGG, Tex., 29 S. W. Rep. 654.

65. LANDLORD AND TENANT — Death of Tenant.—A lease which gives the lessor a right of distress, and extends the rights and liabilities of the parties to their respective "heirs, executors, administrators, successors, and assigns," does not authorize the legal representatives of the deceased lessor to distrain for rent on the goods of his deceased lessee in the hands of the latter's administrator.—GANDY V. DICKSON, Penn., 31 Atl. Rep. 127.

66. LANDLORD AND TENANT—Insolvency of Lessee.—An assignee or receiver has a reasonable time in which to elect whether he will accept or reject a lease, wherein the party whose estate he represents is lessee, and, during such reasonable time, he may enter upon and occupy the demised premises for the purpose of selling, under the direction of the court, personal property thereon belonging to the trust estate, without thereby accepting the lease for such estate.—NELSON V. KALKHOFF, Minn., 62 N. W. Rep. 335.

67. LIFE INSURANCE—Misrepresentations in Policy.—St. 1887, ch. 214, § 21, providing that no "misrepresentations" made in the negotiation of a policy of insurance

shall avoid the policy unless the misrepresentation was fraudulently made, or increased the risk, the word "misrepresentations" applies to warranties incorporated in the policy by reference to the application.—WHITE v. PROVIDENT SAV. LIFE ASSUR. SOC. OF NEW YORK, Mass., 39 N. E. Rep. 771.

68. MALICIOUS PROSECUTION — Mayor.—A mayor of a city, who in good faith caused the arrest of a party under a city ordinance subsequently declared invalid, is not liable for malicious prosecution, though at the time of the arrest he had some doubt as to the validity of the ordinance, and its enforcement rested exclusively with the board of public works, which had refused to enforce it, because they believed it to be invalid.—GOODWIN v. GUILD, Tenn., 29 S. W. Rep. 71.

69. MANDAMUS—Jury Trial.—Issues in *mandamus* being made upon which the parties have a right to a jury trial, and no means being provided by the legislature by which the Supreme Court can secure a jury, the cause must come to an end.—GALBRAITH v. CHICAGO, R. I. & P. RY. CO., Okla., 39 Pac. Rep. 389.

70. MANDAMUS—Restoration of Dismissed Teacher.—A school teacher, who has litigated successfully before the State superintendent the controverted questions upon which her right to compensation depends, is entitled to a writ of *mandamus* to enforce a decision in her favor.—THOMPSON v. BOARD OF EDUCATION, N. J., 31 Atl. Rep. 168.

71. MARRIED WOMAN.—Under Pub. St. ch. 166, § 4, the covenants of a wife relating to her land, when made by deed properly acknowledged, in which her husband joins, are valid.—SCHULTZE v. HILL, R. I., 31 Atl. Rep. 165.

72. MARRIED WOMAN — Damages.—A married woman is liable for antenuptial debts.—BUTTON v. DEHONEY, Ky., 29 S. W. Rep. 615.

73. MARRIED WOMAN—Enforcement of Contract.—A husband made an agreement with a real estate agent to cause to be conveyed to a trustee certain land, part of which was owned by himself, and part by his wife, the profits of the sale of the land by the trustee to be divided between the agent, the husband, and wife. Without further consideration, the wife conveyed her real estate to the trustee: Held, that in equity she could maintain an action for her portion of the profits.—SANGUINETT v. WEBSTER, Mo., 29 S. W. Rep. 698.

74. MASTER AND SERVANT—Injuries to Employee—Defective Appliances.—In an action by a servant against the master for injuries received through the bursting of a water valve, the evidence was that the appearance of the valve did not indicate to one without special knowledge that the valve was defective, and there was no evidence that defendant possessed that special knowledge, nor any evidence inconsistent with the supposition that the valve had been properly tested before defendant accepted it: Held, that the burden being on plaintiff to show that defendant knew, or by proper care might have known, that the valve was unsafe, a nonsuit was proper. — DEANE v. ROARING FORK ELECTRIC LIGHT & POWER CO., Colo., 39 Pac Rep. 346.

75. MASTER AND SERVANT—Injury by Employe—Scope of Employment.—A railroad company is not liable for the act of a brakeman who pushes a trespasser from one of its trains because the trespasser will not pay for the privilege of riding, the money not being demanded as fare, and the brakeman not having any authority to collect fares.—ILLINOIS CENT. R. CO. v. LATHAM, Miss., 16 South. Rep. 757.

76. MASTER AND SERVANT — Injury to Employe—Defective Machinery.—The mere fact that an employe, continuing his work under a promise that a defect in the machinery shall be repaired, knows that it has not been repaired, does not impose upon him the risk of any injury arising from the defect.—TEXAS & N. O. R. CO. v. BINGLE, Tex., 29 S. W. Rep. 674.

77. MASTER AND SERVANT—Safety of Appliances.—If a railway company purchases a locomotive from a firm of builders of recognized high standing and reliability, its duty to those employed about such locomotive will be to see, by the use of ordinary tests for determining its strength and efficiency, that it it is reasonably safe, and suited to the uses for which it was purchased; and such company is not required to dismantle complicated machinery for purposes of inspection, nor to keep on hand such mechanical contrivances, nor to employ such expert labor, as are required for the highest tests.—CLYDE v. RICHMOND & D. R. CO., U. S. C. C. (Ga.), 65 Fed. Rep. 482.

78. MECHANICS' LIENS—Building on Leased Land.—Where a contract to lease provides that the lessee shall erect a building on the premises, the lessor agreeing to pay the costs thereof by permitting the lessee to retain the rents, the lessee erects the building as the agent of the lessor, so as to render mechanic's liens a charge on the interest of the lessor in the land.—KREMER v. WALTON, Wash., 39 Pac. Rep. 374.

79. MECHANIC'S LIEN—Construction of Railroad.—A complaint in an action to enforce a mechanic's lien against a railroad company for labor in the construction of the roadbed, which shows that the company was engaged in the construction of a railroad between two points in P county, that the company contracted with its co-defendant for the construction of the road, that the contractors sublet a portion of the work to plaintiff, that plaintiff performed work under the contract in the construction of the road until stopped by the contractor, and that the work was of a certain value, is not demurrable as failing to show that the work was performed in P county, that it was work for which a lien can be enforced, and that the work was such as was provided for by the contract.—DEAN v. REYNOLDS, Ind., 39 N. E. Rep. 763.

80. MORTGAGE FORECLOSURE—Usury.—In an action to foreclose a mortgage, where defendant alleges usury, and sets up a counterclaim for usurious interest, the issue is not one "of fact in an action for the recovery of money only," within the meaning of Code Civ. Proc. § 274, providing that such an issue must be tried by a jury.—MCLAURIN v. HODGES, S. Car., 20 S. E. Rep. 991.

81. MORTGAGES — Foreclosure of First Mortgage.—Where one buys land subject, in express terms, to two mortgages, and, on foreclosure of the first mortgage, again becomes the purchaser, he takes subject to the second mortgage.—KENNEDY v. BORIE, Penn., 31 Atl. Rep. 98.

82. MORTGAGE INDUCED BY FRAUD.—On an issue as to whether a mortgagor was induced to execute the mortgage through the fraud of her husband, it was proper to refuse to charge that if she was ignorant of the contents of the mortgage, and was induced to sign the same by his fraud, then said mortgage was void, as, in order to invalidate it, it was necessary that the mortgagee should have had knowledge of the fraud.—RIGGAN v. SLEDGE, N. Car., 20 S. E. Rep. 1016.

83. MORTGAGE—Priority.—A party taking a mortgage on real estate is bound at the time to know whether material has been furnished or labor performed in the erection, reparation, or removal of improvements on the premises within the four prior months.—CHAPMAN v. BREWER, Neb., 62 N. W. Rep. 320.

84. MUNICIPAL CORPORATION—Ordinance— Distributing Handbills.—An ordinance of a city prohibiting the distribution of such handbills on the streets as those receiving them would naturally throw on the street, and which are calculated to frighten or endanger horses, is a valid exercise of the police power given to a city by its charter providing that the council may prevent any practice having a tendency to frighten horses, and the general welfare clause.—WETTENGEL v. CITY OF DENVER, Colo., 39 Pac. Rep. 343.

85. MUNICIPAL CORPORATION—Street Crossing—Change of Grade.—Where a grade crossing of a street and railroad was changed by agreement of the railroad company and the city, the company raising its tracks and

the city lowering the street, damages to one owning land adjoining the track by reason of the increased cost of moving freight to and from the cars on the track, cannot be collected of the city, as caused by the change of street grade.—IN RE TUCKER AND FRANKFORD STREETS, Penn., 31 Atl. Rep. 117.

86. MUNICIPAL INDEBTEDNESS—Basis of Limit.—Under Const. Mo. art. 10, § 12, declaring that no city shall incur an indebtedness exceeding 5 per cent. of the value of its taxable property, "to be ascertained by the assessment next before the last assessment for State and county purposes, previous to the incurring of such indebtedness," an assessment cannot be considered which has not passed the State board of equalization. —PRICKETT V. CITY OF MARCELINE, U. S. C. C. (Mo.), 65 Fed. Rep. 469.

87. NEGOTIABLE INSTRUMENT — Payment of Forged Paper.—Held that, upon the facts stated in the complaint, the case comes within the rule that where the drawee of a bill of exchange, or the banker upon whom a check has been drawn, pays a check or bill upon which the drawer's signature has been forged, he cannot recover back the amount if the party to whom he paid it was a *bona fide* holder.—GERMANIA BANK OF MINNEAPOLIS V. BOUTELL, Minn., 62 N. W. Rep. 328.

88. OFFICE AND OFFICERS — Action to Determine Title.—In an action by one claiming a public office to enjoin another in possession of the office from performing the duties thereof, it is not sufficient that the petition should allege that defendant illegally and wrongfully claims the office, but it must show by what authority defendant claims the office.—STATE V. ROST, La., 16 South. Rep. 776.

89. PARENT AND CHILD—Custody of Child.—As against the claim of a child's maternal grandparents, and in the absence of any deed to them of the custody of the child, its father, who is morally and financially fitted to care for it, is entitled to the custody.—LATHAM V. ELLIS, N. Car., 20 S. E. Rep. 1012.

90. PARTNERSHIP — Application of Assets. — Where a partnership is insolvent, a court of equity, when its powers are invoked to that end in a proper proceeding, either by a member of such copartnership or by a firm creditor, will apply the assets of the copartnership to the payment of the firm debts to the exclusion of the debts of the individual partners. — RICHARDS V. LE VEILLE, Neb., 62 N. W. Rep. 304.

91. PARTNERSHIP — Payment of Private Debt.—A transaction whereby one member of a firm, without his partner's knowledge, paid a private debt out of the partnership assets, is *prima facie* fraudulent as to the firm.—BRICKETT V. DOWNS, Mass., 39 N. E. Rep. 776.

92. PLEADING—Amendment.—An amendment may be allowed changing a petition under Pub. St. ch. 52, § 16, for damages to property from acts done in the repairing of a way to a petition under *Id*, ch. 49, § 79, for the assessment of damages for the laying out of a way, if the petitioner, at the time the proceedings were begun, was entitled to the latter relief, and the act relied on in the former petition was the same as that relied on in the latter, as both petitions are of the same general character.—GRAY V. TOWN OF EVERETT, Mass., 39 N. E. Rep. 774.

93. PLEADING — Election — Two Causes of Action.—When the allegations of the complaint are appropriate to either of two causes of action, plaintiff may be required, on motion of defendant, to elect upon which cause he will proceed to trial.—CARTIN V. SOUTH. BOUND R. CO., S. Car., 20 S. E. Rep. 979.

94. PUBLIC LAND — Quitclaim Deed.—The location of land and the return of filed notes to the general land office vests in the locator a right of title requiring no action to enforce it. A deed by which the grantors sell and release, and forever quitclaim, all their right, title, and interest in certain land to another, to have and to hold unto him, his heirs and assigns, "so that neither we nor the grantors, nor our heirs, nor any person or persons claiming under us, shall at any time hereafter have, claim, or demand any right or title to" the land, is a mere quitclaim deed, and charges the grantee with notice of equities.—THREADGILL V. BICKERSTAFF, Tex., 29 S. W. Rep. 757.

95. QUIETING TAX TITLE — Pleading.—In a suit to quiet title, where complainant sets up a *prima facie* valid title under a tax deed, defendant must specifically plead facts tending to defeat the tax sale.—WAGAR V. BOWLEY, Mich., 62 N. W. Rep. 298.

96. RAILROAD BONDS — Sale by President—Innocent Purchaser.—Where negotiable railroad bonds perfect in form, payable to bearer, and certified by the trustee to evidence that they had become obligatory, are placed by the company in the hands of its president to sell or exchange for its benefit, they are valid in the hands of a purchaser in good faith before maturity, though they were disposed of by the president for his own benefit, after consolidation of the company with other companies, and though at the time of the purchase two of the semi annual interest coupons attached to each bond were past due.—LONG ISLAND LOAN & TRUST CO. V. COLUMBUS, C. & I. C. RY. CO., U. S. C. C. (Ind.), 65 Fed. Rep. 455.

97. RAILROAD COMPANY — Killing Stock — Fences.—Though that part of Act 1891, ch. 101, requiring a railroad company to fence its tracks, does not apply to the tracks at a depot, the company is not relieved from liability for the death of a mare that entered on the tracks at a depot, where it is shown that the animal went along the tracks for three fourths of a mile before struck, and that it could not have done so had the company provided the cattle guards also required by the statute.—HUGHES V. NASHVILLE, C. & ST. L. R. CO., Tenn., 29 S. W. Rep. 723.

98. RAILROAD COMPANY — Negligence of Lessee's Receiver.—A railroad company which has leased its line to another company is liable for injuries caused in the operation of the road, though it is being operated by receivers appointed for the lessee.—PARR V. SPARTANBURG, U. & C. R. Co., S. Car., 20 S. E. Rep. 1009.

99. RAILROAD COMPANY—Overcharge—Statutory Penalty.—In an action against a railroad company to recover the penalty provided for a violation of the statute limiting the passenger rate to three cents a mile, an answer attacking the constitutionality of the act, in that, under its rates, defendant cannot maintain and operate its railway except at a heavy loss, and that the act is entailing a great loss upon defendant, which will eventually totally confiscate and destroy its property, rights, and franchises, in that the traffic over its road, in both passengers and freight, is so small and unrenumerative that it cannot, and has not been able to, operate the road under the act without actual loss, in insufficient on demurrer, it not appearing that the statutory rate is unreasonable.—MO. PAC. RY. CO. V. SMITH, Ark., 29 S. W. Rep. 752.

100. RAILROAD COMPANY—Street Car—Negligence.—A girl 14 years of age, who, in attempting to cross a street ran immediately behind a passing a street car, without looking to see whether a car was approaching on the other track, was guilty of negligence.—THOMPSON V. BUFFALO RY. CO., N. Y., 39 N. E. Rep. 709.

101. RAILROAD COMPANY—Street Car—Injury.—Where a street car conductor, by a sudden gesture and ejaculation, frightens a boy of 10 years, who is stealing a ride on the platform, and thereby causes him to fall from the car while it is in motion, the company is liable for the boy's injuries.—ANSTETH V. BUFFALO RY. CO., N. Y., 39 N. E. Rep. 708.

102. RECEIVER—Intervention by Creditor.—Since it is the duty of a receiver appointed for an insolvent corporation to protect the rights of creditors as well as of stockholders, a petition of intervention by a creditor in proceedings in which a receiver has been appointed, by which he attempts to enforce the liability of the stockholders for stock subscriptions, and to compel another creditor to surrender assets of the corporation

held in fraud of the other creditors, is properly overruled.—VOORHEES v. INDIANAPOLIS CAR & MANUF'G CO., Ind., 39 N. E. Rep. 738.

103. RELEASE OF FIRM.—A release by a creditor reciting that whereas a certain named partnership is indebted to him by "virtue of a judgment" recovered against the firm, and whereas he has agreed to compound "said indebtedness" to him of said firm, therefore he releases the "members of the said late firm," other than a certain member, from all liability for the "said indebtedness," and that the release shall operate to discharge all and every person other than such member from all liability growing out of the "indebtedness aforesaid," is a release of the original indebtedness, and not merely of the judgment, and releases a dormant partner of whose existence the creditor was unaware.—HARBECK v. PUPIN, N. Y., 39 N. E. Rep. 722.

104. RELEASE—Rescission.—The mere fact that a person at the time of making a settlement for personal injuries was still sensitive of her injuries, and had been taking medicine, is not ground for rescission; the medicine not being such as to impair her mental faculties, nor the pain such as to subvert her judgment.—BARKER v. NORTHERN PAC. RY. CO., U. S. C. C. (Mo.), 65 Fed. Rep. 460.

105. REMOVAL OF CAUSE—Federal Question.—Under Act. March 3, 1887, ch. 373 and Act Aug. 13, 1888, ch. 866 a cause not depending on the citizenship of the parties, nor otherwise specially provided for, cannot be removed from a State court into the Circuit Court of the United States, as one arising under the constitution, laws, or treaties of the United States, unless the facts making it removable appear by plaintiff's statement of his claim; and the want of such facts cannot be supplied by a statement of them in the petition for removal or subsequent pleadings.—EAST LAKE LAND CO. v. BROWN, U. S. S. C., 15 S. C. Rep. 358.

106. SALE—Insolvency of Buyer.—It is not sufficient, to authorize a seller to replevin the goods sold as against an attaching creditor of the buyer,—that the buyer had had no "reasonable expectation" of paying for the goods.—BURCHINELL v. HIRSH, Colo., 39 Pac. Rep. 352.

107. SALE—Fraud—Rights of Attaching Creditors.—A creditor who, before levying an attachment on a stock of goods, procures a transfer to himself, from the debtor, of the warehouse receipts therefor, will be treated as holding such receipts merely as collateral security, and hence, as against one from whom the debtor fraudulently obtained the goods, stands in no better position than his assignor.—CARSTAIRS v. CHARLES A. KELLEY CO., Ky., 29 S. W. Rep. 622.

108. SALE ON COMMISSIONS.—A factor who receives, with general instructions, a consignment of fish for sale, may cause them to be inspected before putting them on the market, but must exercise ordinary diligence as to the time and manner of sale.—SPRUILL v. DAVENPORT, N. Car., 20 S. E. Rep. 1022.

109. TAXATION—Injunction.—The statute providing a remedy against excessive taxes by objections to the rendition of a judgment therefor is not exclusive, and a tax-payer on whose property an excessive assessment has been made may invoke the aid of equity to compel the tax officers to receive the sum legally due, and to restrain the collection of any further sum.—BENN v. CHEHALIS COUNTY, Wash., 39 Pac. Rep. 363.

110. TENDER—A tender of bank checks payable in 60 and 90 days is not a tender of payment.—CADY v. CASE, Wash., 39 Pac. Rep. 375.

111. TRIAL — Juror — Challenge. — A challenge for cause to a juror who testified on his *voir dire* that he had formed an opinion as to defendant's guilt which it would require evidence to remove should have been allowed, though he also testifies that he thought he could lay the opinion aside, and to try the case on the evidence produced.—STATE v. WILCOX, Wash., 39 Pac. Rep. 369.

112. TRUST—Resulting Trust—Conveyance to Wife.—If a husband purchases land with his money, and voluntarily procures the title to be conveyed to his wife, the presumption is that he intended it as a gift to her, and no trust for him will result.—LESLIE v. LESLIE, N. J., 31 Atl. Rep. 170.

113. USURY—Loan.—H bid in defendant's property at a foreclosure sale, under an agreement to convey it to defendant on repayment of the price, and thereafter defendant executed a mortgage for such amount to plaintiff's testator, who, by agreement of all parties, accepted it as a credit on a debt due him from H: Held, that the transaction was not a contract for the loan or forbearance of money, and hence was not rendered usurious by the exaction from defendant of a *bonus* by plaintiff's testator.—MEAKER v. FIERO, N. Y., 39 N. E. Rep. 714.

114. USURY—What Constitutes.—A note which provides for the compounding of interest thereon is usurious if by such compounding the interest exceeds the legal rate.—BROWN v. CROW, Tex., 29 S. W. Rep. 653.

115. VENDOR AND PURCHASER—False Representations.—It is no defense to an action on notes given under a contract to purchase land that defendant was induced to execute the contract by the false representations of plaintiff that he was then making costly improvements on land adjacent to that covered by the contract.—WASHINGTON CENT. IMP. CO. v. NEWLANDS, Wash., 39 Pac. Rep. 366.

116. VENDOR AND VENDEE—Rights of Purchaser—Title.—Where title to land attempted to be conveyed by deed, has never been divested from the State, the grantee, though he subsequently acquired the title by purchase from the State, can recover from the grantor the full consideration paid.—LAMB v. JAMES, Tex., 29 S. W. Rep. 647.

117. VENDOR AND VENDEE—Sale of Land.—Where a vendor of land takes a note for the unpaid price, and retains a lien therefor, and afterwards assigns the note, and conveys his interest in the land to another, the assignee may, in case of non-payment of the note, enforce the lien, and recover the land, though when suit is brought the note is barred by limitations, and though the vendor's interest was not conveyed till after the transfer of the note, and after it had became barred.—WHITE v. COLE, Tex., 29 S. W. Rep. 758.

118. WILL — Defeasible Fee.—Testator devised a farm in trust for J, with power in the trustee to collect the rents thereof for the support of J, and provided that the farm should go, after the death of J, to his children, if he had any, but that, if they had none, it should go to any person whom J might devise it to, and that it should be "theirs" forever: Held, that J was vested with a fee which could be defeated only by his having bodily heirs.—MCCALLISTER v. BETHEL, Ky., 29 S. W. Rep. 745.

119. WILLS—Nature of Estate.—A devise to H for life, and after his decease "unto his then surviving heirs in fee," gives H the fee-simple title to the estate.—HEISTER v. YERGER, Penn., 31 Atl. Rep. 122.

120. WILLS — Nature of Estate Devised.—A testator devised all his property to his wife, "for her sole use and comfort during her natural life, and to her heirs and assigns forever:" Held, that she took a fee in the property.—KENDALL v. CLAPP, Mass., 39 N. E. Rep. 774.

121. WILLS — Construction.—Stocks were devised to testator's son, to be held in trust ten years, then to be delivered to him; if deceased, then to his son; if both were deceased before the 10 years have expired, then to be transferred to his daughters L and M; if either daughter was deceased, her portion was to be transferred to the remaining daughter; if both were deceased, then to certain others: Held, not to create a trust which suspends alienation for a longer period than two lives in being.—MONTIGNANI v. BLADE, N. Y., 39 N. E. Rep. 719.